

Transcript Prepared by Clerk of the Legislature Transcribers Office  
Judiciary Committee February 24, 2023  
Rough Draft

**GEIST:** Good afternoon. We're going to go ahead and get started. If I can have your attention, we're going to go ahead and get started. Good afternoon and welcome to the Judiciary Committee. My name is Senator Suzanne Geist. I represent the 25th District in-- here in Lincoln, and I am serving as Vice-Vice Chair for the Judiciary Committee today. We'll start off having members of the committee and the committee staff do self-introductions, starting on my right with Senator McKinney.

**McKINNEY:** Good afternoon. Senator Terrell McKinney, District 11, North Omaha.

**MEGAN KIELTY:** Good afternoon. Megan Kielty, legal counsel.

**ANGENITA PIERRE-LOUIS:** Angenita Pierre-Louis, committee clerk.

**HOLDCROFT:** Rick Holdcroft, District 36, which is west and south Sarpy County.

**DeKAY:** Barry DeKay, District 40, which encompasses Holt, Knox, Cedar, Antelope, northern part of Pierce, and most of Dixon County.

**GEIST:** Also assisting us are our committee pages, Lowell [SIC] Brtek from Norfolk, who is a political science and criminology major at UNL, and Isabel Kolb, from Omaha, is a political science and pre-law major at UNL. This afternoon we will be hearing six bills that will be-- we'll take them up in the order listed outside the room. On the tables in the back of the room, you will find the blue testifier sheets. If you're planning to testify today, please fill out one and hand to the pages when you come up. This will help us keep an accurate record of the hearing. If you do not wish-- wish to testify but would like the record-- would like to record your presence at the hearing, please fill out the gold sheet in the back of the room. Also, I would like the-- to note the Legislature's policy that all letters for the record must be received by the committee by noon the day prior to the hearing. Any handouts submitted by testifiers will also be included as part of the record as exhibits. We would ask, if you have any handouts, that you bring ten copies and give them to the pages. If you need additional copies, the pages will help to provide them. Testimony for each bill will begin with the introducer's opening statement. After the opening statement, we will hear from any supporter of the bills, then from those in opposition, followed by those speaking in a neutral capacity. The introducer of the bills will then be given the

opportunity to make closing statements if they wish to do so. We ask that you begin your testimony by giving us your first and last name, and please also spell them for the record. We will be using a three-minute light system today. When you begin your testimony, the light on the table will be green. The yellow light is your one-minute warning. When the red light comes on, we ask that you wrap up your final thoughts. I would like to remind everyone, including senators, to turn off your cell phones or put them on vibrate. And with that, we will begin today's hearing with LB95. Good afternoon. Good afternoon. Go ahead.

**SUE ELLEN STUTZMAN:** Good afternoon. Vice-Vice Chair-- Chairman Giest. My name is Sue Ellen Stutzman, S-u-e E-l-l-e-n S-t-u-t-z-m-a-n. I am Senator Slama's administrative aide. I am here today to introduce LB95 on behalf of Senator Julie Slama. This bill addresses litigation involving exposure to asbestos. The Asbestos Trust Claims Transparency Act accelerates the filing of claims that plaintiffs submit to trust created by former asbestos producers in bankruptcy. The trust-- the trust exists to compensate plaintiffs for asbestos-related harms who are caused by bankrupt companies. Exposure history information provided to the trust will be available to solvent defendants that face personal injury lawsuits brought by the same individuals. By removing the dis-- the disconnect that pr-- presently exists between asbestos trust and civil justice systems, juries will be available-- able to hear about all of the plaintiff's exposures to asbestos. This will help them decide who is responsible for the plaintiff's harm. Today, evidence of plaintiff's exposure to asbestos products made by bankrupt companies is often suppressed by plaintiff attorneys, misleading juries to believe that a defendant at trial was the cause of the plaintiff's harm, when the real plain-- real culprit may be a bankrupt company not in the courtroom. LB95 puts-- puts the plaintiff-- plaintiff's entire exposure history in the open for the jury to see. In this manner, wrongdoers remain fully accountable. Further, plaintiffs will obtain compensation for the trust more quickly. Almost one third of the states have similar laws. The Asbestos Claim-- Priorities and Claims Legitimacy Act contains criteria to set aside and preserve claims filed by plaintiffs who claim past exposure to asbestos but are not presently sick and may never develop an asbestos-related impairment. In the past, lawyers who primarily represent cancer victims have criticized these filings for delaying claims by-- by the truly sick and depleting resources needed to pay deserving claimants in the future. Claims alleging asbestos-related cancers will require a physician's opinion that the

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cancer is as-- is asbestos related and not caused by something else, such as smoking. As one commentator recently explained across the country, there has been a startling increase in lawsuits where plaintiffs are claiming that their lung cancers are asbestos related. Only plausible-- the only plausible explanation for the increase is that a substantial number of these lung cancer claims are simply not attributable to asbestos exposures. Together, these reforms will filter out premature or baseless claims, speeding recoveries and preserving compensation assets for legitimate asbestos claims. The act also addresses to the indiscriminate naming of defendants in asbestos cases without proof of exposure. Many defendants named in asbestos complaints today have no connection or liability for plaintiff's injuries. They are in-- in-- innocent bystanders swept into the asbestos litigation by lawyers who take a "sue first and figure out the facts later" approach. As one might expect, when companies are named in lawsuits without a connection to the plaintiff, they are typically dismissed at some point, but these defendants are forced to waste resources in the form of defense cost for each dismissed case. The cost across many cases can be su-- substantial and has contributed to push companies into bankruptcy. The act requires asbestos plaintiffs to di-- to disclose the factual basis for each claim against each defendant and provide supporting documentation. Iowa was the first state to pass such a law in 2020 and has since been joined by a number of other states. In addition, the act requires parties to consent to multiple-plaintiff trials in asbestos cases. Prejudice arises when multiple claims are tried together, particularly cases that involve different types of injuries for many defendants. Finally, a manufacturer or seller is not liable in an asbestos action for exposures from a later-added asbestos-- asbestos-containing product made or sold by a third party. This is consistent with traditional Nebraska law, which holds that a company is liable for products it puts into the stream of commerce, but it is not liable for harms caused by others. I'd be more than happy to take questions from you, and then I will follow up with Senator Slama and get back to you.

**DeBOER:** Any questions then? Oh, yeah, we can't ask questions.

**SUE ELLEN STUTZMAN:** That's OK. And I review-- and I will-- I will not-- I will not have a close.

**DeBOER:** OK. Thank you very much. Just getting back here. OK, so [LAUGHTER] we'll take our first proponent. I'm awake now. Hello, everyone.

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**SUE ELLEN STUTZMAN:** Thank you.

**DeKAY:** Did you have a good-- nice vacation?

**DeBOER:** Hey, now. First proponent testifier.

**MARY MARGARET GAY:** I was trying to catch all the Vice-Vice Chairs, Senator. I was like, who am I addressing now? What are we [INAUDIBLE]

**DeBOER:** I'm back.

**MARY MARGARET GAY:** You're back.

**DeBOER:** I'm here.

**MARY MARGARET GAY:** OK, OK. But you're just Vice Chair, not Vice-Vice Chair [INAUDIBLE].

**DeBOER:** That's right.

**MARY MARGARET GAY:** So good afternoon, Vice Chair DeBoer and Senators. It's good to see you on this very cold afternoon here in Nebraska. My name is Mary Margaret Gay, spelled on-- spell it M-a-r-y M-a-r-g-a-r-e-t G-a-y, and I'm here today in support of LB95. I am a practicing attorney in Jackson, Mississippi, licensed to practice in Mississippi and Arkansas, and provide national counsel for clients all over the country, companies who have been sued in asbestos litigation. I use the term "litigation" very broadly because it's asbestos industry at this point. It is multiple, multiple, multiple years of litigation. More than 10,000 companies have been involved in asbestos litigation over the past 30 to 50 years, first cases filed and still being filed today. More than 25 companies a year see their first asbestos claims each year. Companies roll out of the system a lot of the times into a bankrupt system. You'll hear people talk about a trust claim system. A lot of times it's what you see on the noon commercial at lunch on CNN, where there are now parallel systems that run. It is a trust claim system where the large companies who are responsible for asbestos liabilities have now filed for bankruptcy. Plaintiffs can make a claim to those systems while at the same time continuing to pursue companies in the litigation system across the country. So you have dual ways of receiving compensation. The asbestos bankruptcy funds have hit \$30 billion to pay claimants. Most claimants can make 15 to 20 claims. Those claims are very easy to make. Some submitted up to 18 at a time. You fill out a sheet, you say you have been in a certain location, you have exposure, and these

companies who caused exposure to asbestos, these-- many of these plaintiffs are very sick from, are able to receive immediate compensation from the trust. What happens is that does not cross over into the tort system. And so you have small businesses, many of whom didn't even have any involvement in asbestos litigation at that-- this point. I used to say second-tier defendants. We're now into third- and fourth-tier defendants, some having never seen any type of asbestos product flow through their company, mom-and-pop stores, hardware stores, car parts stores, any type of store. This legislation is intended to make sure that money and resources are preserved for plaintiffs who are sick and need to be compensated in the system. I assume that means I'm out of time.

**DeBOER:** That is-- that is what that means.

**MARY MARGARET GAY:** It's a quick three minutes when your name is Mary Margaret Gay.

**DeBOER:** And you have to spell the whole thing. [LAUGH] Yes, but I'm confident there will be questions for you.

**MARY MARGARET GAY:** Sure. I'm happy to answer questions.

**DeBOER:** All right. Are there any questions? Senator Geist.

**GEIST:** I do.

**MARY MARGARET GAY:** Sure.

**GEIST:** And I am not an attorney. I don't pretend to be one. I-- I'm curious if you can explain to me the process of what makes a third- or fourth-tier company that had no involvement, how do they get involved in this system if they've had no exposure or no asbestos come through their company?

**MARY MARGARET GAY:** The quickest answer is Google, but the real answer is what happens is, because plaintiffs come in-- there's a latency period when you have an asbestos illness. So the person who comes in has had exposures over a very long ti-- period of time. They don't always have memory of things and people start Googling and what happens is-- that's fine. That's a fine way to start, but you as a lawyer need to rail that down and look really to the company that had the exposure. And what we're seeing is complaints where an attorney-- and this is, you know, the worry-- a company in New York or California or Florida or Oregon gets their name out there on a complaint and it

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drops into a database, and these complaints get circulated over and over and over. People just cut and paste. The reason we find the cut-and-paste a lot of the time is because names are misspelled or companies are named incorrectly, but it just ends up in a database out there. The other thing that happens is they assume when a case is filed without using due diligence at the time it's filed, to make sure that the auto parts store or the mom-and-pop air conditioning company or electrical products company was even in the town, established and operating at the time the person was there and exposed.

**GEIST:** OK.

**MARY MARGARET GAY:** We just pulled up the yellow book listing of all of the auto parts companies that may have been in an area and we name them all and figure it out later.

**GEIST:** OK.

**MARY MARGARET GAY:** It started out, you know, you would have smaller complaints, and then it just escalated to the point-- it's one thing to have one complaint that you're engaged in incorrectly. It's another thing to have 2,500. The cost to defend yourself, and the numbers and data to show it, we see where companies are named, 9 months, 10 months, 18 months to do litigation, dismissed.

**GEIST:** Yeah.

**MARY MARGARET GAY:** So does that answer your question?

**GEIST:** It does-- it-- so it's just of no fault of their own. It just happens to be where this person may have formerly worked or Googled and saw that this store or location--

**MARY MARGARET GAY:** It's usually the plaintiffs' attorneys who have databases that they share--

**GEIST:** OK.

**MARY MARGARET GAY:** --among each other. These are all the asbestos complaints I filed yesterday.

**GEIST:** Oh.

**MARY MARGARET GAY:** I'm going to add this company now into the database of microphone makers.

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**GEIST:** OK. Wow. All right. Thank you.

**DeBOER:** Senator McKinney.

**McKINNEY:** Thank you, Senator DeBoer. And thank you. How many people per year die from asbestos?

**MARY MARGARET GAY:** Well, so from asbestos or from mesothelioma?

**McKINNEY:** Yeah.

**MARY MARGARET GAY:** I can tell you the diagnosing rate. I don't know that I know the actual number for deaths. On average, about 2,000 people a year are diagnosed with mesothelioma. At this point, I think most of those cases get filed. It's interesting, the very serious plaintiffs who file cases in asbestos litigation are the ones who turn out, in the other states where this type of legislation has been entered, to benefit the most because the resources are preserved for the very sick, who actually have a claim against a company to do.

**McKINNEY:** When did-- when did companies start learning about the dangers of asbestos?

**MARY MARGARET GAY:** I think that's been litigated for years and years and years. OSHA regulations in the early '80s were probably where a lot of people have settled, but people have been warned of asbestos harms and exposures for, I think, as long as it's been in use.

**McKINNEY:** And did some of these companies cover up the dangers of asbestos?

**MARY MARGARET GAY:** I can't-- I mean, I can't answer that. I'm sure they did.

**McKINNEY:** And many of these companies who both exposed workers to asbestos knowingly, knowing it could potentially cause cancer or-- and aggressively-- and they tried to cover it up, from di-- different research teams I've looked at. For example, Urban [SIC] Carbide, they knew its workers were being exposed to deadly asbestos in the '60s. They covered up the health effects, choosing to make hay while the sun shined, in order to profit before the public knew about the health effects of asbestos. After regulators went public with the dangers of asbestos, Urban [SIC] Carbide encouraged their sales associates to get aggressive with customers to keep them from using asbestos. And Urban

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[SIC] Carbide and other companies like them, they continue to be sued to this day, right?

**MARY MARGARET GAY:** Most of those companies that were the original asbestos distributors are now in bankruptcy and the federal has created a process through 524(g) bankruptcy that allows them, because of those types of things, to channel those liabilities into a trust fund that pays claimants, which is different than the litigation system we're talking about.

**McKINNEY:** So you would agree that Urban [SIC] Carbide is a-- a-- a larger company?

**MARY MARGARET GAY:** I don't know the company Urban Carbide. There is a company called UCC that I think was Union Carbide, maybe, but I don't know Urban Carbide.

**McKINNEY:** From what I got, they're worth about \$5 billion independently, and this bill could be used by them or others to avoid, for example, in a wrongful death claim where the plaintiff is a widow of the worker who died from asbestos. If the widow cannot provide the information required in Section 10 of this bill at the time she files the claim because she doesn't have firsthand knowledge and doesn't have access to discovery, then Urban [SIC] Carbide could have the claim dismissed.

**MARY MARGARET GAY:** Yes, in a lawsuit, if you can't prove up that a company had liability at the time of filing, you-- you would not pursue a claim.

**McKINNEY:** So if I died from asbestos and you're my wife, you can't get any recourse.

**MARY MARGARET GAY:** You can absolutely have recourse--

**McKINNEY:** But what if I don't--

**MARY MARGARET GAY:** --but you can't file a case unless you know who to sue.

**McKINNEY:** That's the issue with the bill, that if she files a claim because she doesn't have the firsthand knowledge, if she doesn't have access to the discovery, I would die, my family would just be--



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**MARY MARGARET GAY:** Oh, no, you can amend the lawsuit later. If you come into new information that a company has liability for an injury, you would amend your lawsuit and add it.

**McKINNEY:** What if she doesn't have firsthand knowledge and doesn't have access to discovery?

**MARY MARGARET GAY:** Well, how are you going-- OK. In my professional opinion, as a lawyer, I could not bring a lawsuit against a company unless I had information that that company caused a injury to my client.

**McKINNEY:** So if I worked in construction and was exposed and my family did, as many of these families are doing, is filing claims against--

**MARY MARGARET GAY:** Absolutely.

**McKINNEY:** In this bill, it would make it difficult for my family to--

**MARY MARGARET GAY:** No, it would make it difficult for a plaintiff to sue all 500 construction companies in the telephone book. It would make you only sue the companies who you know or should-- or could know that there is a relation to-- between the person who's deceased and the person. And the reason for that is those other companies should not be involved in a lawsuit and resources should not be taken away from your wife, who may have a legitimate claim against a company because someone else who does not is going after them in a lawsuit they don't belong in.

**McKINNEY:** OK. Thank you.

**MARY MARGARET GAY:** Sure.

**DeBOER:** Other questions? I have a couple. Is-- is Union Carbide in bankruptcy?

**MARY MARGARET GAY:** Union Carbide has been in and out. I don't represent them, so I don't currently know Union Carbide's status.

**DeBOER:** Because I heard you talking to Senator McKinney but--

**MARY MARGARET GAY:** Yeah, it's Union Carbide, and I don't know if that's the same one he was ta-- I do know of a company named Union Carbide. I don't know if they are currently in bankruptcy. They've had multiple entities that have gone--

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**DeBOER:** Sure.

**MARY MARGARET GAY:** --multiple different ways.

**DeBOER:** I-- because I feel like--

**MARY MARGARET GAY:** I'm happy to pull the bankrupt list and send it to you [INAUDIBLE]

**DeBOER:** I think that one is not. Trying to re-- recollect, but I think that one is not. And I'm trying to think. Are there others that are some of these large companies that are still not-- because Union Carbide is huge--

**MARY MARGARET GAY:** Correct.

**DeBOER:** --the subsidiary of Dow, I think.

**MARY MARGARET GAY:** Again, I don't represent them, so I'm not sure.

**DeBOER:** Yeah, yeah, yeah. So some of these are big companies that are not in bankruptcy.

**MARY MARGARET GAY:** Correct.

**DeBOER:** So there may be quite a few that are still out there that are not in bankruptcy--

**MARY MARGARET GAY:** To-- I mean--

**DeBOER:** --so it's not just little--

**MARY MARGARET GAY:** Of the 10,000, only 100 have bankruptcies, so, yeah--

**DeBOER:** Yeah, OK.

**MARY MARGARET GAY:** --9,000.

**DeBOER:** So-- so there are there are a number of these companies that are still big, viable, not in bankruptcy, defendants that are not part of the trust scheme.

**MARY MARGARET GAY:** Well, are you asking are they involved in the litigation or are they liable for asbestos liabilities? Because I would argue the 100 companies that are in bankruptcy were the

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companies who were the primary, and I don't think there's any argument about that in any of the historical documentation, were the primary distributors of the asbestos.

**DeBOER:** I think they are certainly amongst and maybe even some of the main ones. I mean, I know like Johns Manville and some of those are the main ones, but, like, there are still big-- large share of the asbestos community entities out there that are not in these trusts. Do you know-- you don't have knowledge of that?

**MARY MARGARET GAY:** I'm not sure I follow the question. Are you asking me if there are large companies still involved in asbestos litigation?

**DeBOER:** That had-- well, yes, that's-- well, yes.

**MARY MARGARET GAY:** Yes. I do not know their liability, if that's what you're asking me--

**DeBOER:** Sure.

**MARY MARGARET GAY:** --compared to a Johns Manville because Johns Manville was--

**DeBOER:** One of the big ones.

**MARY MARGARET GAY:** --the big one.

**DeBOER:** Yeah. Let me ask you a different question.

**MARY MARGARET GAY:** Sure.

**DeBOER:** Have-- do you have-- because you're from-- where did you say you were from?

**MARY MARGARET GAY:** Jackson, Mississippi.

**DeBOER:** Mississippi, better weather.

**MARY MARGARET GAY:** Yeah, it was 80 yesterday. It's fantastic.

**DeBOER:** All right, now you're bragging. Here in Nebraska, have we had this happen in Nebraska?

**MARY MARGARET GAY:** So there are a few cases that have been filed in Nebraska over the last couple of years with larger-than-normal numbers of asbestos defendants named on the cases. And the biggest issue comes

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in, and what we're kind of seeing around the country as legislation is-- is enacted, is making sure that this litigation, much like you see a weather pattern, doesn't end up in Nebraska. Nebraska does a very good job of making sure that it protects its citizens and its business community in putting things in place that provides transparency. And I think the thought here is, because it is maybe not a-- what they like to call a hellhole jurisdiction, as a lot of jurisdictions are-- nobody wants to be on that list.

**DeBOER:** So--

**MARY MARGARET GAY:** But the concern is that there are a lot of those around you and there are places where, you know, because now you see one 1-800 asbestos claims, those claims move around the country to the most litigious places, as well as the places that--

**DeBOER:** But it's--

**MARY MARGARET GAY:** --maybe can help them get around the laws that are put in place in other places.

**DeBOER:** But it's not happening here-- not yet.

**MARY MARGARET GAY:** There have been a couple of cases filed in Nebraska. I have not gone in and researched the over-naming. The one I looked at was a 2020 case and I think 43 percent of the defendants named in the case were dismissed without any payment for liability. So at least-- nearly half of the defendants named in that case, and I don't have the number for you here, were named in a lawsuit that they were later dismissed from for no finding of liability and no payment.

**DeBOER:** OK. Do you know, when--

**MARY MARGARET GAY:** That's one too many.

**DeBOER:** --when-- when you are involved in these-- in the discovery portion of these cases, are there times when folks will, perhaps a widow, perhaps who, I don't know, who--

**MARY MARGARET GAY:** Say that-- I'm sorry I missed--

**DeBOER:** --perhaps a widow, perhaps someone else will, in the process of discovery, learn of liability they didn't know about in the past?

**MARY MARGARET GAY:** Usually that is few and far between. Most of the times, when I'm in a situation where there is a very sick plaintiff, that plaintiff has worked closely-- usually meso, which progresses fast-- work closely with their lawyer and work closely with their spouse to get all the potential information they can get to them, because those are the ones that progress with real reliability.

**DeBOER:** So--

**MARY MARGARET GAY:** It's the one where my clients get dismissed that we don't ever depose anyone and there's no discovery that seemed to just-- a ridiculous waste of resources.

**DeBOER:** So my question, though, is about those that do discover things in discovery, right? Because the discovery process, it's been a long time since I practiced law, but when I was a litigator--

**MARY MARGARET GAY:** It hasn't changed.

**DeBOER:** --20-some years ago-- OK, good to know. When you're in discovery, the-- the whole point of discovery process is literally the word "discovery"--

**MARY MARGARET GAY:** Correct.

**DeBOER:** --like you're-- you're-- you're intending to discover things that you do not already know.

**MARY MARGARET GAY:** Sure.

**DeBOER:** And so there is this sort of obligation. You send an interrogatory over. They answer it. You send over a request for documents. They produce them. And the idea is that, as a system, we'd like everybody to have all the information. So that's why you do a deposition. I, by the way, say that these hearings are the depositions, and up on the floor is the-- is the trial. So we just want everybody to have all the information.

**MARY MARGARET GAY:** Correct.

**DeBOER:** So that's the-- sort of the point of discovery, right?

**MARY MARGARET GAY:** Yeah, and that's-- the transparency part of this bill hits exactly on that, making sure that everyone in the case is aware of all the available information, especially as it relates to

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the injury and the plaintiff, who may have recovered hundreds of thousands, sometimes millions, of dollars from a bankrupt trust.

**DeBOER:** Well, that's not quite the part yet. Well, maybe. Maybe.

**MARY MARGARET GAY:** OK.

**DeBOER:** I think I'm getting what you're saying now. Sorry, I wasn't quite there yet.

**MARY MARGARET GAY:** OK.

**DeBOER:** But really, we need the facts, right? A lot of what the discovery part is like, what are the facts of the case? You're saying one of the facts of the case is whether they've already recovered from somebody else.

**MARY MARGARET GAY:** Sure.

**DeBOER:** OK. Point taken.

**MARY MARGARET GAY:** OK.

**DeBOER:** Other facts are, you know, who sold to who, how did this information get there, how did the asbestos come in contact with the plaintiff. There are things that come up in discovery that you don't know about ahead of time.

**MARY MARGARET GAY:** Absolutely.

**DeBOER:** Yeah. All right, thank you. Any other questions? Did that spur any? Senator McKinney.

**McKINNEY:** Thank you. So I was sitting here going through Section 10. And just looking at this, do you not think this is a high standard, especially for like a widow, to even be able to-- I'm just looking-- so part (c) says a person who file--

**MARY MARGARET GAY:** You'll give me just a sec to flip to make sure I'm--

**McKINNEY:** OK.

**MARY MARGARET GAY:** --following you exactly. What did you say, Section 10?

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**McKINNEY:** Ten, part (c), it says the specific name of each asbestos-containing product, including, but not limited to, all branded and trade names of that specific asbestos-containing product, to which the exposed person was exposed or the other person was exposed if exposure was through a person. Then you get to part (d), the identity of the manufacturer and seller of the specific product; (e) For each product identified of the subdivision of (1)(c) of this section, each site and specific location at each site, including the address of each site, where the exposed person was exposed or other person was exposed, and-- and that one kind of sticks out. So if I'm working construction, get home late, maybe I don't communicate with my wife every day that-- where we worked at this day. But if my wife-- if I die and my wife want to fine-- file a claim, she has to go back 20 years and track my whereabouts about you were at this construction site at this time, you were at this cons-- do you not think that's a high barrier?

**MARY MARGARET GAY:** I think that is information that her lawyer should help her obtain prior to filing a case against a company.

**McKINNEY:** So it's not a high standard, in your opinion?

**MARY MARGARET GAY:** I don't think so. As a lawyer, I would do that for my client. And if you don't know it, you amend the complaint at a later time and add them in, but you-- they should not be able-- should not be asked to expend exorbitant amount of resources for a unknown. They should be named when they should be named in a lawsuit.

**McKINNEY:** If-- so we're in an age of technology, but prior to that, this act would make it super difficult for anybody to find this information, just honestly speaking. Yeah, you could say the-- the lawyer should be diligent and find information. But if the records weren't kept properly, those type of things, this is a high standard, honestly, and-- and you could-- you-- you're never going to agree because you're a lawyer and your-- your-- your support is billed. But I'm just being honest. This is a high standard. But I-- I thank you for your testimony.

**MARY MARGARET GAY:** Thank you.

**DeBOER:** Other questions from the committee? I do not see any. Thank you so much for being here.

**MARY MARGARET GAY:** Thank you. Have a good one.

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**DeBOER:** Let's take our next proponent. Next proponent. Is anyone else here to testify in favor of this bill? Let's go to next the opponents. Do we have any opponents of LB95? Welcome.

**ELIZABETH GOVAERTS:** Good afternoon. My name's Elizabeth Govaerts, E-l-i-z-a-b-e-t-h, last name G-o-v-a-e-r-t-s. I am here on behalf of the Nebraska Association for Trial Attorneys. I am a trial lawyer here in Nebraska. I represent plaintiffs only, only human beings. I will tell you, I've never handled an asbestos case. I know of no asbestos cases tried to verdict here in the state of Nebraska. I looked. I could not find any. Given the description of these cases by the last speaker, if they are multiple defendants, I assume those were in federal court. I am also unaware of any Nebraska-based asbestos manufacturers here. So as we sit here today, I am unaware of any cases in this state where this particular-- the issues that this bill seeks to address have occurred. Also, the irony is not lost on me that it is the asbestos industry coming here today to make plaintiffs and their lawyers the bad guys here. Mesothelioma is a terrible, aggressive, deadly form of cancer. You can only get it from exposure to asbestos. It most likely will have affected veterans and firefighters. In fact, 30 percent of the asbestos diseases, specifically mesothelioma, 30 percent of those cases are veterans. The other highest class of plaintiffs are firefighters. We are continuing to have new cases every day because young people now are getting asbestos-borne diseases because they-- asbestos was brought on their parents' clothing and they're getting sick today, young people in their 20s and 30s. We have approximately 15,000 new cases a day. The trusts were established not out of the kindness of the heart of the asbestos industry. They were condition of those companies' bankruptcy. Those trusts are meant to carry out to the year 2040, 2050. They pay cents on the dollar. And you should know that if a plaintiff's case is worth \$1,000,000, then Johns Mansville is paying \$10,000, \$15,000. Those how the-- are how those victims are being compensated.

**DeBOER:** OK.

**ELIZABETH GOVAERTS:** Does the red light mean I should stop?

**DeBOER:** Yeah, the red light means you're stuck. I was just letting you finish your sentence.

**ELIZABETH GOVAERTS:** Thank you.

**DeBOER:** So are there questions for this testifier?



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**HOLDCROFT:** Yes.

**DeBOER:** Yes. Senator Holdcroft.

**HOLDCROFT:** Thank you, Vice Chair DeBoer. I didn't-- maybe I didn't follow you, but you started off by saying there haven't been any cases, asbestos cases in the state of Nebraska.

**ELIZABETH GOVAERTS:** I'm talking about cases in state court, which is what this legislation would affect.

**HOLDCROFT:** So there haven't been any cases, but we have all these cases of mesothelioma in the state of Nebraska, so why haven't they been in state courts?

**ELIZABETH GOVAERTS:** Well, here's the bottom line. Most of these cases were from plaintiffs who got their cases at their job sites. And we do-- we have many, many victims. We're one of the lower states in the country but we do. Now people who contracted asbestos on their job, that jurisdiction is solely within the Workers' Compensation Court.

**HOLDCROFT:** Compensation.

**ELIZABETH GOVAERTS:** And the compensation court is set up to deal with inhalation diseases and those people are compensated. Now what we're talking about and what this bill seeks to address are products liability cases specifically. And this bill, as far as I can tell, only puts up roadblocks to dying people who are drowning in their own diseased lungs, only puts up roadblocks to getting to sue a solvent defendant with the chance of getting full compensation. It puts hurdles up in front of them that no other class of plaintiff has to conquer.

**HOLDCROFT:** OK. Thank you.

**ELIZABETH GOVAERTS:** You're welcome.

**DeBOER:** Thank you, Senato Holdcroft. Senator Geist.

**GEIST:** I'm curious. You said something about they bring the asbestos home in their clothing. Tell me about that exposure. How long does someone-- or what's the exposure like for a young person, which I'm assuming is the transference problem?

**ELIZABETH GOVAERTS:** Exactly. That's a really good question, Senator Geist, because the latency period for these diseases can be 30 years between the time that they're exposed and they develop the disease. So we're talking about children who get this hideous cancer in their early adult years, and they call the-- the original asbestos defendants are called the "big dusties," because what happened was-- is that those products just spewed asbestos residue and dust everywhere. And, you know, tragically, it was brought home to children in the '70s, '80s, and now, you know, they're dying of these cancers today, and think about the hurdles that this bill puts up for people like that. Now, no lawyer is going to file a lawsuit, again, without a defendant, so our-- this assumes that lawyers have already done their due diligence, because they have to have a named defendant, but this bill requires these plaintiffs to know a whole bunch of information. And-- and again, these are children who-- who-- and-- and Senator McKinney's point is well taken-- who they don't-- they may not have an idea as to all the exposures, so they're doing the best they can to piece together. There is a lot of data out there, including the data generated by these trusts, so they're doing their best they can to identify a defendant. But they have to do this onerous prelitigation pile of information. There's no converse requirement for the defendant to do that, and usually, the only way you can get to the bottom of who's responsible is in the course of discovery. You can't get to discovery until you've met that threshold.

**GEIST:** So you would say cast the net wide rather than narrow.

**ELIZABETH GOVAERTS:** Well, you cast-- in-- in all kinds of cases, you can-- you try to make sure that you've targeted every liable defendant.

**GEIST:** Or potentially liable.

**ELIZABETH GOVAERTS:** Correct. And you don't-- you know, it's not a machine gun spray. You know, what you're doing is with the best knowledge that you have, these products were used in this area in these years, and then you do discovery also. It's-- it's-- this is a back-and-forth process to see. And our rules of procedure have ways for these defendants to be dismissed out of cases if they have no exposure or no liability.

**GEIST:** OK. But again, back to my first point, was how-- how-- do you know how much exposure it takes for a person to bring home on their clothing to tr--

**ELIZABETH GOVAERTS:** Do you mean the-- are you talking about the amount of exposure--

**GEIST:** Yeah.

**ELIZABETH GOVAERTS:** --to asbestos that can cause the disease?

**GEIST:** Yes. Yes.

**ELIZABETH GOVAERTS:** Disease can be caused by one strand of asbestos in your lungs.

**GEIST:** OK. Thank you.

**ELIZABETH GOVAERTS:** Yeah.

**DeBOER:** Other questions? I have a few for you.

**ELIZABETH GOVAERTS:** Yes.

**DeBOER:** We're really reaching back to the back reaches of my memory here. Nebraska's a notice pleading state.

**ELIZABETH GOVAERTS:** Correct, like the federal system.

**DeBOER:** We're like the federal system. I think, if I recall correctly, when I was in law school, that was right as the time we were switching from fact pleading to notice pleading. Not everyone here knows those terms. Can you tell us the difference between fact pleading and notice pleading?

**ELIZABETH GOVAERTS:** Yes. The Nebraska system, notice pleading, requires that a plaintiff set out the basic elements of their claim sufficient so that the court can see that the plaintiff has alleged and can prove, *prima facie*, elements of the claim, and for the defendant to be able to know what claim they're defending. And fact-based pleadings requires that a plaintiff plead every single fact required in order to plead-- to prevail in their case. So that's a good question in light of Section 10, I believe it is, that seems to require this extra element of fact-based pleading by way of an affidavit before you can even proceed, and that is not what Nebraska rules of procedure require. And again, this is one defendant in all of the land that has this particular benefit pre-suit and one class of plaintiff that has this almost impossible hur-- hurdle for a suit.

**DeBOER:** So the reason I asked for fact place-- fact pleading versus notice pleading, so if you get it wrong with fact pleading and you don't plead one of the facts, that's problematic for your suit, right?

**ELIZABETH GOVAERTS:** Yes, it is.

**DeBOER:** What happens when you get a fact wrong in fact--

**ELIZABETH GOVAERTS:** Well, it's fatal to your suit, as a matter of fact. And here is-- and so Nebraska has moved away from that. That's not what we require.

**DeBOER:** OK. So the federal govern-- the federal system does notice pleading. We moved to notice pleading let's not say how many years ago, because that will date me, but a number of years ago. Why did we do that? Why did we move to notice pleading from fact pleading?

**ELIZABETH GOVAERTS:** Well, because it's-- it's fair to both parties. You have-- a defendant has to know what they're defending against. And in a products liability-- let's-- let's take a products liability pleading. In notice pleading, you still have to have your defendant right. You still have to have your product right. You still have to explain within that pleading where the person was exposed to the product. You have to say what their injuries are, and you have to sh-- plead the causal connection between the exposure to that product and the plaintiff's injuries. And so the defendant is able to still prevail. But if this-- if our-- if it's fact-based pleadings and you are wrong, then you have failed to meet your burden of proof. Almost-- I don't know. This is a guess. This is a wild guess, but I'm guessing less than ten states still have fact pleadings. I know California does, I think. But so this is the-- the reason we've done this is because we have a whole procedural system to get rid of claims anyway that aren't any good. We've got motions to dismiss. We've got motions for summary judgment. We've got directed verdicts and we have the whole discovery process.

**DeBOER:** OK. So in the-- the legislation before us today, there is a process whereby you're required to have applied to the trusts.

**ELIZABETH GOVAERTS:** Yes.

**DeBOER:** You may not be the right person to ask this question, probably should have asked it to the previous testifier.

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**ELIZABETH GOVAERTS:** I know a little bit of something about how that application process works, so lay it on me. I'll see if I can answer.

**DeBOER:** All right. Thank you. About how long does it take to go through one of those application processes?

**ELIZABETH GOVAERTS:** It depends. There's two ways to apply. You can apply to take the sort of standard distribution or there's also a process for an individualized award in those trusts. There's 60 of them. It all depends on what trust you're applying to. But it is not like bringing your little bowl up and asking and-- and it's just automatically filled. That's not how they work. There is an application process. There is a vetting and discovery process in all of those. It is-- doesn't take as long as litigation, that's for sure. Most of these trusts have been operating for a while. They know what they're doing. But it's not a guarantee. Just an application alone does not guarantee a recovery from those trusts. It can take anywhere from months to years, probably not any more, but it's-- it's not-- first of all, it's not a guarantee and it's not necessarily a quick process. And also, some of the trusts who pay \$700, \$600, perhaps a litigant might just say to themselves, given that, this may not be worth my time.

**DeBOER:** So I don't know this. I-- full disclosure, in the late '90s, I did do some litigation, defense litigation in asbestos cases, but again, it's been a long time. Can you apply to multiple trusts at the same time?

**ELIZABETH GOVAERTS:** Yes, you can.

**DeBOER:** OK.

**ELIZABETH GOVAERTS:** Yes, you can, but-- but again, you have to-- you have to show that you have some exposure to that product, and you-- the trusts have, I-- if I remember right, and you may know this better than I do, Senator DeBoer, but-- but I believe the trusts are organized in sort of like workplace type, like ship-- you know, San Diego shipyards and things like that, so that if you worked at the shipyards, you know, between, you know, 1960 and 1975, you know that these products apply and that you know where to apply, and yes. And-- and there were multiple products, really, for most people's cases, and so you could apply to as many as you want.

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**DeBOER:** So if I am a person whose husband has mesothelioma, which, my understanding is, is kind of an 18-month death sentence--

**ELIZABETH GOVAERTS:** It is, yes.

**DeBOER:** --you've got a-- kind of a clock after you get meso-- that if I apply to one of these trusts, let's say it goes through quickly. I don't know what the time is. I should have asked the previous one about how-- how long the time is, but let's say it goes through a few weeks. Then I-- I put a claim in for-- in state court for a case. I have a number of defendants. Under this litigation-- or under this legislation, what happens if they say to me, oh, you missed one of the trusts? Do I have to go back and--

**ELIZABETH GOVAERTS:** Yes, you do.

**DeBOER:** --put in an application?

**ELIZABETH GOVAERTS:** Yes, you do, yeah.

**DeBOER:** Does it have to go-- does it have to go to resolution?

**ELIZABETH GOVAERTS:** I-- it-- this-- I don't believe it has to go to resolution.

**DeBOER:** OK.

**ELIZABETH GOVAERTS:** And I-- and I only know that from just me reading the language of this bill, and so actually I don't know.

**DeBOER:** OK. I'll ask-- I'll ask--

**ELIZABETH GOVAERTS:** I don't know exactly what that-- what that means. But-- but you do have to apply if the de-- and-- and this is if the defendant decides you do. The defendant has that absolute stop button to say, oh, you need to apply to this trust, litigation, we-- we had trial in 60 days, but litigation is going to stop and you have to go through that whole process, while you're dying, to try to recover from that funds before this can resume. And P.S.--

**DeBOER:** What's the-- what's the time frame? Like you apply to the trust, how long do you have to wait after applying to the trust to get back to your litigation?

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**ELIZABETH GOVAERTS:** Well, once the defendant and the judge is comfortable that you've met all the requirements of your application process, I believe it's like then the trial can be set from at 90 days after that time period. There doesn't seem to be any limit on how many times a defendant can do this, though, so at how many times during the stage of this litigation, can the litigation be completely stopped?

**DeBOER:** Maybe that's something we can clean up.

**ELIZABETH GOVAERTS:** Yeah.

**DeBOER:** OK. Are there other questions? Yes, Senator Geist.

**GEIST:** Yeah, I was just going to ask, in-- in light of what you were just winding up there, it's-- is there any opportunity or maybe possibility of working with Senator Slama on this and-- so she's not here, so I can't ask her, but between the two of you, of finding some common ground in this litigation-- I mean, in this legislation?

**ELIZABETH GOVAERTS:** Well, I-- I can't-- I do not believe the Nebraska Association of Trial Lawyers [SIC] would support any bill that delays a litigant's access to justice under any circumstances.

**GEIST:** OK.

**DeBOER:** Thank you, Senator Geist. Other questions?. Thank you for being here.

**ELIZABETH GOVAERTS:** Welcome.

**DeBOER:** Next opponent.

**JOHN CORRIGAN:** Good afternoon. My name-- my name's John Corrigan, C-o-r-r-i-g-a-n. I'm an attorney with the firm Dowd & Corrigan, 6700--

**DeBOER:** Can I ask you to speak just a little bit louder?

**JOHN CORRIGAN:** Sorry.

**DeBOER:** This room is terrible for that.

**JOHN CORRIGAN:** Hearing loss. 6700 Mercy Road. We're a law firm in Omaha, Nebraska, and I appear today on behalf of the Nebraska Professional Firefighters and the Omaha Professional Firefighters Local 385, specifically because in June of 2022, the International Agency for Research on Cancer determined that firefighting is

cancerous to humans. It is a carc-- it is a known carcinogenic occupation, specifically with regard to mesothelioma; that is, if you are a firefighter with a sufficient enough-- enough time working as a firefighter and you have mesothelioma, it is scientifically-- within a degree of scientific certainty that it was caused by firefighting. And that determination that was made by the International-- International Agency for Research on Cancer in 2022 is-- that agency is an agency the state of Nebraska relies upon in Nebraska Revised Statute 35-1001, which is our cancer presumption legislation, which says if you have been exposed to a known carcinogen as defined by the International Agency for Research on Cancer and you meet some other prerequisites, then you are entitled to a presumption for pension purposes under the state of Nebraska. Why does that matter in this legislation? We're talking about, you know, there-- there is issues with respect to workers' compensation because, you know, the people that are doing firefighting are taking on those risks on behalf of the citizens who employ them to provide that public safety. And the cities who employ them, they may have an interest in suing the manufacturers of asbestos that winds up hurting or-- or killing their employees. This legislation just puts a bar at the courthouse door that has to be jumped over unnecessarily in the state of Nebraska. We don't have a lot of these cases that are going, as counsel before, that are going to state court. And some of the-- the-- the suggestion that-- you have to go out and get a doctor that will support your case and they have to-- they set out in-- in Section 13 of the bill the standard for the-- the medical standard, and then the court has to have a hearing on that to make sure that you've satisfied the standard, that you've established a prima facie showing under their definition of what that means, but that doesn't count against them for the rest of the case. So this is simply an industry bill designed to protect industries that are not under any attack in the state of Nebraska. And because the firefighters are bearing this risk--

**DeBOER:** OK.

**JOHN CORRIGAN:** --they-- they-- they are uniquely positioned to get this disease, and this is bad legislation for them.

**DeBOER:** OK. There's your red light. Gotta respect the red lights. All right. Are there questions for this testifier? Senator Geist.

**GEIST:** I'll throw it back out there. I want to just ask you the same thing. I've assumed you've-- you've talked with Senator Slama about



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your concerns and would maybe be willing to talk with her about some middle ground here?

**JOHN CORRIGAN:** No, we-- I have not talked with the senator about her concerns. I guess our position is, because these folks are doing a job that is known to expose them to this substance, they shouldn't have any separate right to access of the courts as anybody else. Now a lot of these cases are resolved-- or not resolved but-- we don't have a lot of mesothelioma cases. We have some that-- with firefighters and there are pension systems and there are workers' compensation systems. But those are-- those provide benefits based on prescribed amounts, not-- you don't get damages for pain and suffering. You don't get damages for the loss of the enjoyment of life. You don't get the-- the wrongful death damages. And to close those-- the-- the opportunity to seek those through the civil justice system off to these folks who are bearing this risk on behalf of the citizens, is just bad public policy. So I-- if she wants to talk to us about how we can better protect firefighters from mesothelioma and the effects of asbestos, we're happy to talk about. Protecting the companies that make that from being sued? That-- we're not interested in talking about that.

**GEIST:** Thank you.

**DeBOER:** Other-- wait, wait just a second, Mr. Corrigan. Are there other questions for the committee? Mr. Corrigan, do you know, are there currently Nebraska manufacturers of asbestos?

**JOHN CORRIGAN:** I don't know. I don't-- I-- I have no idea. And I-- I'd be interested to know that. I mean, if we're going to protect somebody, we ought to try to find out whether somebody-- those companies are providing jobs in the state. But I don't know.

**DeBOER:** OK. Thank you.

**JOHN CORRIGAN:** Thank you.

**DeBOER:** Other questions? OK. Let's take our next opponent. Any other opponents? Is there anyone who would like to testify in the neutral capacity? For the record, there are four letters, two in support, two in opposition. Senator Slama waives clothing-- closing. This is not my day. Senator Slama waives closing, and that will end our hearing on LB95 and bring us to LB325. Senator Dungan.

**DUNGAN:** I will not be waiving closing.

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**DeBOER:** Thank goodness. Senator Dungan, welcome to your Judiciary Committee.

**DUNGAN:** Good afternoon. Vice Chair DeBoer and members of the Judiciary Committee. I am Senator George Dungan, G-e-o-r-g-e D-u-n-g-a-n. I represent the good people of northeast Lincoln in Legislative District 26, and today I'll be introducing LB325. The concept of LB325 is not new to this committee, at least in its prior incarnations, and was in fact brought by both Senator Lathrop and Senator Wayne in 2021 as LB54 and LB71, respectively. In fact, Senator Wayne had a related bill, LB729, that passed in 2018 dealing with state tort liability for misrepresentation and deceit. LB54 was ultimately advanced out of this committee previously and on to Select File. LB325 creates an exception to both the State and Political Subdivision Tort Claims Act. When the harm caused by an intentional tort is a proximate result of the failure of the state or political subdivision or their employees to exercise reasonable care to either control a person over whom it has taken charge or protect a person who is in the political subdivision's care, custody or control from harm caused by a nonemployee actor. The Torts Claims Acts are based on sovereign immunity, which is a fundamental legal principle found in federal, state and local government. In the acts, the state waives its sovereign immunity except in certain circumstances or exclusions, which include claims arising out of intentional torts. One of those exclusions was the subject of a case decided by the Nebraska Supreme Court in September of 2020. Of note, in coming to their conclusion, the court's approach to considering the issue was different from the way the U.S. Supreme Court has interpreted the Federal Tort Claims Act, which is nearly identical to the Nebraska Tort Claims Act. In Moser v. State, an inmate named Terry Berry, who was very talkative, was just about to be released and was double bunked with a person who was in for a serious crime and known to be violent. The violent inmate protested the placement with Mr. Berry. Placing him in that cell violated the Department of Corrections' own regulations. It's important to note that the state controlled both inmates and neither had a different course of action in the matter. The state was the only one that had a different course of action that was not taken. Soon after the placement, the inmate killed Mr. Berry, as he said he would. Terry Berry's family, the personal representative being named Moser, brought a lawsuit for the wrongful death of this individual. The Nebraska Supreme Court concluded that there was immunity based on Section 7 of the State Tort Claims Act, which is also known as the intentional tort exception to the waiver of sovereign immunity. Intentional torts

include things such as assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights. The court concluded that, if there is an intentional tort anywhere involved in the injury, even if the state was negligent in allowing it to happen, sovereign immunity still attaches. There's no liability and the state or political subdivision cannot be sued. LB325 keeps the intentional tort exception or-- except in very specific situations where the state or political subdivision failed to exercise reasonable care to control the person over whom it has taken charge or protect a person in its care, custody or control from harm by a nonemployee actor. Reasonable care is a minimum standard and is the degree of caution and concern that a prudent and rational person would use in the same or similar circumstances. This standard does not require the state or political subdivision to know something they could not have known, but only to act in a manner that others in the same situation would have. While the Moser claim was based on inmates in prison, the decision has had much farther reach as this interpretation of the intentional tort exception to the waiver of sovereign immunity applies to foster care placements by the state, children assaulted in schools, and our elderly family members in nursing homes. The effect of the decision in Moser is an elimination of the duty to protect children or people to whom the state or political subdivisions owe a duty of care from the intentional acts of others. The Nebraska Supreme Court, in their decision, invited the Legislature to review the language in their decision, which is why I've brought and reintroduced the language, similar language, of LB325 today. Thank you, and I'm happy to answer any questions, and I would urge your consideration of LB325 to General File.

**DeBOER:** Are there questions for this testifier, for Senator Dungan? Senator Dungan, I have a question for you. So we just used a lot of lawyer words.

**DUNGAN:** Yeah

**DeBOER:** Love it, love it. But what this really does is this takes us from where we were prior to the Supreme Court decision and returns us, but a little narrower than we were before the Supreme Court decision in Moser. Is that right?

**DUNGAN:** That's correct, yeah. So what we're asking essentially is just to clarify the language that, exactly, brings us back to where we were pre-2020. So in that Moser decision, the Supreme Court made a certain

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interpretation of the law based on how they-- how they read it, and what we're asking is just to return how it had been for time immemorial prior to that. We're not asking for any major modifications. And you're right. It's actually a more narrow interpretation than it was previously, and I think that's the difference between the legislation before you today and some of the prior incarnations of this bill, is that we actually tried to make it even more narrow with regard to the intentional torts that it affects.

**DeBOER:** So this is dealing with a situation where someone has a loved one, maybe it's-- I think I heard a story about a little girl who had developmental disabilities, who was in the custody in care of-- it was, I don't remember, maybe a school district. Maybe it was somebody else. I don't remember who it was, but it was some state actor who was molested by a third party that they knew that they were putting her into contact with, and that her family had no recourse. Would this situation be still something that could be handled in this-- under this fix?

**DUNGAN:** Yeah. So I think that's a good-- a good question. And I think one of the things that's difficult with this is trying to imagine easy-to-understand hypotheticals where this would apply, and I think you've described one. So this is about intentional torts done by third-party actors and political subdivisions, like, for example, a school, right, a teacher. If they have knowledge or should have had knowledge that this was going on and they had a duty to protect that child, but they breached that duty by essentially ignoring that information they had, then, yes, now there'd be a recourse to try to make that victim whole. As I testified to yesterday, and I think we've talked about this many times, the entire intent of the civil system, one of the many points of the civil system is to try to make victims whole, and so this provides that opportunity in circumstances where, for example, the teacher or the school knew or should have known. What this doesn't do is open them up to liability for any third-party intentional tort that happens if they didn't have either a duty to protect that person or if they didn't know or have a reason to know that was happening. And so I know a question that was asked of me one time by a person who worked at a school and we were talking about this was, let's say there's two kids in a hallway who get into a fight and the teacher was in the hallway, monitoring the hallway, and got called away by somebody else and missed this fight breaking out in the fight happened. Under my interpretation of this, the school wouldn't be held liable for that because that teacher didn't know or have any reason to know or breached their duty towards those students that that was going

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to happen. Now, for example, if it was two kids who said, if you put us in the same classroom together, I promise you I'm going to go beat up little Billy over there and the teacher said, I don't care, I'm going to put you in there anyways, plugged their ears, covered their eyes and walked out, and then that third party assaulted that individual, then that liability may attach if the court deems that. So what we're not trying to do here is completely subvert the intent of the Political Subdivision Torts Claim [SIC] Act. That's not what we're trying to do. We're just trying to create that avenue for recourse in a circumstance where somebody knew or should have known that this was going to happen and essentially abdicated their duty to that person that they were trying to protect, and-- and that's exactly what would happen in that Moser case as well.

**DeBOER:** And I think that this is reminding me that what the case was, was that there was a teacher that put a girl in a wheelchair, developmental disabilities, and another student who had been acting inappropriately towards her in a room by themselves, walked out; sure enough, girl gets molested, and now there's literally no recourse, because of the Moser decision, for that family and that little girl who doesn't have any way to deal with that problem. Is that fixed under your bill?

**DUNGAN:** Yeah, that's the intention. Exactly.

**DeBOER:** OK. Other questions? Senator DeKay.

**DeKAY:** You mentioned like three times sh-- known or should have known. Where do they go to should have known? How-- how should have they known?

**DUNGAN:** I don't want to get too deep into the weeds with that, not because I don't want to answer your question, just-- but just because there's legal case law and things the courts can look at. I mean, the idea of known or should have known is a very standard sort of element that a lot of courts look at and judges look at in a number of cases, whether it's criminal or civil. I think you've probably heard a lot of testimony about like a reasonable person standard, which is that subjective standard where somebody analyzes whether or not a reasonable person knew or should have known that something was happening. It's very similar to that. And I-- again, I'm probably butchering a lot of very specific legal definitions here, but it is a determination that's made by judges and lawyers on a regular basis. And so it's not something new we're creating in here. It's a standard,

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for example, with regard to negligence or any other kind of tort or intentional tort, that I believe the courts would have no difficulty interpreting.

**DeKAY:** So would it be on the same wavelength of known and possibly ignored the situation, or is that-- is that what we're talking about?

**DUNGAN:** Yeah, and I think the exact circumstances in that Moser case are a really good example, right, where you have two inmates who are being placed in the room and somebody says, If you do that, I'm going to kill him, and then the guard or whomever says, I don't care, I'm going to ignore that or-- or maybe says, for example, I didn't think he was being serious, and then the court could look at that and say, well, a reasonable actor in that circum-- circumstance should have known that doing that action was going to lead to that result based on a totality of the circumstances that you're analyzing there. So some experts are probably going to testify much clearer than I am about that, but that's-- that's a really baseline understanding of kind of what that standard looks like.

**DeKAY:** I'm trying to under-- I'm-- and thank you for that. I'm trying to understand. I'm not trying to work my way through law school now, so I'm just trying to get a definition on it.

**DUNGAN:** You're--

**DeKAY:** But thank you.

**DUNGAN:** Yeah, absolutely. Thank you.

**DeBOER:** Thank you, Senator DeKay. Senator Dungan, that "knew or should have known" standard helps plaintiffs because they can't prove what someone was thinking in their own head. Right? So it's the should have known so you can say, look, if you have all the circumstances in front of you, I can't prove what was in your head, whether you knew, but you should have known because the light was green, you saw the light was green, everybody saw the light was green, and you started going, therefore, I can't prove you saw that the light was green, but you did act like you saw the light was green, so it's a way to get to the intent factor. Is that right?

**DUNGAN:** That's correct. Yeah. It's-- it's looking at the totality of circumstances that would be presented at trial. I think that you-- you're hitting the nail on the head with that. If somebody were to get up on the stand and you-- they just said, you know, if-- I didn't see

the light was green. But all of the circumstances surrounding that, you were looking at it, the light was green, you were looking-- there was no-- nothing in your way, all of these things, like a reasonable person would know that light is green. But this prevents somebody from just getting up there on the stand and saying, no, I didn't, and having that be the thing that sort of ends the-- the litigation right then and there. So I think that's a really good example of the should have known. It's just looking at all of the evidence being presented and applying something similar to that reasonable person standard.

**DeBOER:** OK. Are there other questions for Senator Dungan? I don't see any. Let's have our first proponent testifier. Welcome.

**CAMERON GUENZEL:** Vice Chair DeBoer, Senators, my name is Cameron Guenzel, C-a-m-e-r-o-n G-u-e-n-z-e-l. I am testifying on behalf of the Nebraska Association of Trial Attorneys. I am a Nebraska-- an attorney practicing in Nebraska and here to chat with you about LB325. I think it makes sense to ask, why do we impose a liability on anyone for negligent supervision? The answer is twofold. One is to compensate those legitimately harmed by the negligence-- negligence of another; and two, to provide an incentive for entities to take reasonable care of those in their charge. So then the question is, should government entities like schools or prisons be subject to liability for negligent supervision? We, as a state, have already answered that question in the affirmative. If a teacher on a field trip unreasonably fails to protect students from being negligently struck by a car, that teacher and school can be sued. That's the law currently. But for some reason, when the injury is caused by an intentional act, the teacher and the school is-- and the school are immune. There's no reason for that distinction. Now it might be argued that the intentional harm caused by third parties is less foreseeable than third parties acting negligently and, therefore, public entities shouldn't be liable for them. But the injured party still must prove negligence and that the public entity acted unreasonably. And if the third party's actions are unforeseeable, the claim would not meet the negligence standard in the first place. But there are times when a public entity fails to protect against intentional harm, which is entirely foreseeable. I represented a student who was told by classmates by a Snapchat that they were going to beat him up after school. He took the Snapchat to a vice principal. The vice principal told the student he would be protected and the student relied upon that. But the VP got distracted or something and never took any action. Foreseeably, the student was attacked and suffered brain damage. When we presented the claim, the school all but admitted fault. But then Moser came out and the claim

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was no longer actionable simply because my client was intentionally hurt, rather than negligently occurred. This distinction between negligent versus intentional makes no sense. We want public entities to reasonably-- reasonably protect citizens under their care from both negligent and intentional harm. To hold otherwise is to tell public entities you can act unreasonably and get away with it so long as the person in your care is hurt intentionally. Let's face it. The risk of civil liability absolutely impacts the precautions that entities take. So I ask you to support LB325. Let's encourage public bodies to protect those within their care and, yes, allow compensation for the victims who are harmed by unreasonable actions, whether they are employees or not. And I will take any questions, if there are any.

**DeBOER:** Are there any questions for this testifier? I think you have some that up so well.

**CAMERON GUENZEL:** It's [INAUDIBLE]

**DeBOER:** It really got there for me. So you're saying that there-- currently under the law, pre- and post-Moser, if you have a negligent third party, exception to the Tort Claims Act, you can be sued.

**CAMERON GUENZEL:** Correct. If I'm on a field trip and I let the kids run out onto the street and they're hit by a car, negligently hit by a car, clearly, I can be sued for that. It's the-- the distinction here is that it's intentional. And that's a distinction that-- a distinction without a difference that predates--

**DeBOER:** So--

**CAMERON GUENZEL:** --anybody in this room.

**DeBOER:** So let's do this, this hypothetical, just to make it totally clear. Teacher takes kids on a field trip, says, kids, go play in traffic, kids go play in traffic, negligently hit: lawsuit.

**CAMERON GUENZEL:** Yes.

**DeBOER:** Kids go play in traffic. They're playing in traffic. Instead, bad actor says, I'm going to kill those kids, hits the kids: no lawsuit--

**CAMERON GUENZEL:** Well, yes. That's absolutely [INAUDIBLE]

**DeBOER:** --against the-- against the school.



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**CAMERON GUENZEL:** Right.

**DeBOER:** You'd have it against the bad actor, sure.

**CAMERON GUENZEL:** Now, the-- the interesting thing there is, is the plaintiff would have to prove that that bad actor was on unfor-- was-- that-- that that was foreseeable. So it's certainly foreseeable the person would be injured. But, yes, that's exactly right. If it just happened to be that that driver intentionally ran over kids, under the Moser decision and under our current-- current law, there'd be no liability against the school.

**DeBOER:** All right. Other questions? Thank you. That makes it clear. Next proponent. Anyone else here to testify in favor of this bill? Let's have our first opponent.

**BRANDY JOHNSON:** Members of the committee, my name is Brandy Johnson. B-r-a-n-d-y J-o-h-n-s-o-n. I am general counsel for Nebraska Intergovernmental Risk Management Association, also known as NIRMA. I'm also here today on behalf of the League of Nebraska Municipalities.

**DeBOER:** Can you talk a little louder? I'm sorry.

**BRANDY JOHNSON:** I will try, yes. I have given you copies of the long version of my testimony, but I'll try to keep it brief here in the interest and respect of your time constraints. To clarify, NIRMA is not an insurance company. It's a membership organization where counties come together to pool their taxpayer dollars to defend and pay claims. A key part of NIRMA's mission is to safeguard those taxpayer funds, and that's why I'm here today to oppose LB325, because it does disrupt the balance that has existed for over 50 years in our Tort Claims Act. It would create more civil litigation liability exposure on the public fisc and ultimately the taxpayers. The torts aim-- claims acts have been explained to some degree. I would submit that there really is no such thing as pre- and post-Moser. The-- the intentional torts exemption has existed in the Tort Claims Act for the entire 50 years, and what Moser actually did was dig through past case law and find this one outlier case that actually didn't find the-- didn't preserve immunity like other cases in the past had. There are pay-- cases in the past where immunity wasn't raised, but that exception or immunity has always existed in the Tort Claims Act. The crimes that we're talking about here, like assaults, intentional torts, those-- these crimes can be prosecuted. These people can be

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convicted. Victims can have recourse and restitution. I also want to point out that there is a federal remedy here for these victims that hasn't been mentioned. If government entities are deliberately indifferent to a known risk of a crime, there is a federal civil rights remedy that's available to them. LB325 would open the door to an additional state law avenue of relief that is at a negligent standard, which is a lower bar for liability than the federal standard. And as a practical matter, it does apply to all the cases that have been talked about, the student-on-student violence, I think the inmate-on-inmate violence is a big category. But these terms in the bill, it's unclear how they would be interpreted, so it could be any situation where law enforcement isn't able to prevent harm to someone when they respond to an incident. It could even extend to a situation-- the harms that might come from an active shooter that comes into a public building. I believe our law enforcement, our corrections folks, our school folks are-- they have very difficult jobs. On one hand, they have to balance the civil rights of the people that are in custody or that they're taking into custody. They can't put too many restrictions on their freedom of movement. They've got to balance that against this bill that would make them potentially subject to many damages if they don't do enough to protect from criminal behavior. But--

**DeBOER:** Ma'am, I'm sorry, the red light.

**BRANDY JOHNSON:** Yeah. I'm sorry. I am out of time.

**DeBOER:** It's OK.

**BRANDY JOHNSON:** That went quickly.

**DeBOER:** I'll-- I bet you get a question. Senator Geist.

**GEIST:** I-- I have an unlaywerly question.

**BRANDY JOHNSON:** OK.

**GEIST:** So there's a different standard, you said, from this to the federal or from-- it-- was it from what's current in state law here to the federal standard, or can you repeat that and then explain what the difference is to me?

**BRANDY JOHNSON:** Yep, I will do my best. The federal standard is deliberate indifference. So if a governmental entity is deliberately indifferent to a known risk of-- of harm or, in this instance, a

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crime, the governmental entity would be liable. That's existing law. LB325 would open a new avenue to civil liability damages under state law, and that new avenue to liability under state law that LB325 proposes is a lower threshold for liability. It's the reasonable care standard that had been discussed previously.

**GEIST:** OK. And those are just known terms in litigation that-- and I'm seeing heads nod.

**BRANDY JOHNSON:** Yes.

**GEIST:** OK.

**BRANDY JOHNSON:** Lots of lawyers in the room, I know.

**GEIST:** Thank you.

**DeBOER:** Thank you, Senator Geist. So the reasonable person standard would be the reasonable person of the caretaker who owes the duty of protection to the individual who eventually gets hurt. Is that right?

**BRANDY JOHNSON:** It is a reasonable care standard. The-- the danger there with the lower standard in part is just that these are sad and tragic cases. This-- these are cases where a judge is looking with the benefit of 2020 hindsight at circu-- over these circumstances and second guessing how--

**DeBOER:** But that's the entirety of negligence. I mean, like, we're always looking in hindsight. That's-- that's how the entire litigation system goes. I mean, we always have the benefit of that hindsight. That's not specific to this situation.

**BRANDY JOHNSON:** Nope. In any negligence case, that wo-- that would be true. I'm just drawing that distinction between the-- the two different legal standards and the interests of the public are-- are, you know--

**DeBOER:** So-- so sovereign immunity, for a second, let's talk about that. Sovereign immunity is this idea that you can't sue the king. I mean, that's initially it, right? The idea that you can't sue the government for anything, the sovereign immunity statutes actually carve out the exceptions to that rule--

**BRANDY JOHNSON:** Correct.

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**DeBOER:** --when you can sue them. And we list a number of reasons why governmental actors are potentially liable in certain circumstances. Is that right?

**BRANDY JOHNSON:** Well, I would characterize it as, and-- and you may have say the-- said this. I don't mean to say you're incorrect, but I would describe it as in the olden days, the-- there was no governmental liability at all. The Tort Claims Act opened up--

**DeBOER:** Yeah.

**BRANDY JOHNSON:** --all kind-- all the liability to governmental entities, but very carefully, 50 some years ago, carved out these specific exceptions and said, we're going to place some protections on the public fisc, on taxpayer dollars, and we're going to carve out some exceptions where government can't be subject to civil litigation or-- or be-- be liable. And so that was the balance that was struck then.

**DeBOER:** But those are--

**BRANDY JOHNSON:** What's being proposed--

**DeBOER:** Those are--

**BRANDY JOHNSON:** --is an exception to an exception. Sorry.

**DeBOER:** Those are public policy decisions that are being made by bodies like this one. In fact, it was made by this body a while back. We're the ones who get to decide that. Right?

**BRANDY JOHNSON:** Right, true.

**DeBOER:** Those are statutory decisions that are made by statute, by a body like this one, that we weigh the various pros and cons, so all of this is really on us to determine whether we think that there's a public policy reason to do it or not.

**BRANDY JOHNSON:** I think that's true. I would disagree with the contention stated earlier that the Supreme Court is inviting action here. I think this-- majority of the Supreme Court was very careful to-- to say this is a public policy decision, but the Legislature has to consider the impact on the public fisc if it's going to open that door.

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**DeBOER:** Yeah, I mean, we don't have to do what they say anyway on that, so--

**BRANDY JOHNSON:** True, true.

**DeBOER:** --whether or not they invite us or not, we can come to the table or not. It's our own decision. Senator Geist.

**GEIST:** I'm sorry, one more. I was just reading your testimony about the federal. The difference between the federal and-- and this bill, and-- and I was reading quickly, so I might have missed it, but the federal remedy has an uncapped payment.

**BRANDY JOHNSON:** Correct.

**GEIST:** Does this?

**BRANDY JOHNSON:** Does.

**GEIST:** If we pass LB325, is it uncapped for damages?

**BRANDY JOHNSON:** No. For the state, it would be uncapped. To my understanding, the State Tort Claims Act and the Political Subdivision Tort Claims Act, there is a cap of \$1,000,000, \$5 million aggregate, so there is that cap there in the Tort Claims Act. And you're right: under the federal remedy that I mentioned, no cap on damages or your statute of limitations; attorney's fees are recoverable in that-- in those federal actions.

**GEIST:** OK. I think that's all I can think of right now. Thanks.

**DeBOER:** All right. Thank you, Senator Geist. Other questions? Thank you for being here.

**BRANDY JOHNSON:** Thank you.

**DeBOER:** Next opponent testifier.

**CHUCK WILBRAND:** Good afternoon. My name is Chuck Wilbrand. I'm a partner at the Knudsen Law Firm here in Lincoln, and I'm here on behalf of the Nebraska Association of School Boards, ALICAP, and the League Association of Risk Management. LB20-- L-- LB325 begins the dissolution of sovereign immunity. That's been discussed. Right now, school districts, other political subdivisions in the state are immune for any claim arising out of an assault and other intentional torts.

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That would include assault, sexual assault cases. This bill begins the dissolution of that and starts to create a new standard of proximate cause that isn't typically recognized, and it will start to dissolve all intentional tort immunity. The proximate cause law has held that in all contexts, people and entities cannot be liable for the criminal acts of others. This bill would start to take that away. Further, the bill is circular and ambiguous about who is protected, what is-- what's going to be constituted and under the control and care, and exactly who they owe that du-- duty to is ha-- going to have to be litigated against. That's going to be more expensive for costly litigation; it's going to lead to more appeals, which cause more attorneys' fees; then, ultimately, it's going to end up costing taxpayers more money when these claims are brought to the fed. Therefore, I asked this Judiciary Committee not to advance this bill, and I welcome any questions.

**DeBOER:** Can you spell your name for us, sir?

**CHUCK WILBRAND:** Wilbrand, W-i-l-b-r-a-n-d.

**DeBOER:** Thank you. Are there questions from the committee? I have a question for you. I didn't-- I didn't quite hear. Did you say that this bill would start to create a situation where someone owes a duty for someone else's behavior? Is that what you said?

**CHUCK WILBRAND:** The criminal acts, criminal acts by-- done by somebody else, an intentional tort.

**DeBOER:** Wouldn't that be the case if it was a non-- so if it was a private school instead of a public school that did the things that we were describing before, would-- wouldn't they have a duty of care to make sure that the-- the students that are within their care, when they knew they were going to fight and beat up little Timmy or Billy or whatever he said the name was, that-- that they would be liable if they knew or should have known that there was a damage that they did-- you know, a reasonable person would not leave the two of them alone, blah, blah, blah. Wouldn't that already exist in law?

**CHUCK WILBRAND:** Well, private schools don't have sovereign immunity.

**DeBOER:** That's what I'm saying. So in a private school situation, you could sue the private school. Yes?

**CHUCK WILBRAND:** They could attempt to sue the private school. Whether or not they would actually be successful, I do not--

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**DeBOER:** Sure. Right. You'd have to prove your elements and blah, blah, blah, and everyone would have to believe you and you'd have to make your case and be successful.

**CHUCK WILBRAND:** Correct. And as mentioned, you know, those fe-- there are federal statutes that public schools have or they can be liable under that private schools do not. Title IX is an example of that.

**DeBOER:** Yeah. So if the only difference is between the public school and the private school, I mean, it doesn't add a duty that you owe to someone else. It's just changing who owes that duty and saying that now public schools are held to the same standards as private schools with respect to having that duty of care to those that they take care of.

**CHUCK WILBRAND:** I wouldn't say it's the exact same standard. I think the problem with this, and again, you-- I think you run into this even if you're trying to hold the private school liable, but you have the proximate cause of when this bill is talking about the damages are a proximate result of the intentional tort, the damages are the result of the intentional tort. When someone goes and creates that intentional tort, that's the damage.

**DeBOER:** But there are third party-- I mean, we hold people liable in our legal system as third parties for having a duty of care that they breach in a variety of circumstances. This is not the only circumstance in which someone owes a duty of care to someone that a third party could breach that duty of care because they didn't do what they were supposed to do to make sure the third party didn't do that.

**CHUCK WILBRAND:** Sure, and I understand that.

**DeBOER:** Yeah. OK. All right. Thank you. Are-- unless there's other questions? No. Thank you.

**CHUCK WILBRAND:** Thank you.

**DeBOER:** Next opponent. Welcome.

**JENNIFER HUXOLL:** Thank you. I'm sorry. I've got a frog in my throat today, so--

**DeBOER:** Oh, that's OK. We'll try to--

**JENNIFER HUXOLL:** --I'm gonna try to project. Good afternoon, committee members. My name is Jennifer Huxoll, J-e-n-n-i-f-e-r, Huxoll, H-u-x-o-l-l. I'm an assistant attorney general and the bureau chief of the civil litigation bureau at the Attorney General's Office. I'm testifying in beh-- on behalf of the Nebraska Attorney General. LB325 presents a significant erosion of sovereign immunity protections resulting in additional exposure to the state of Nebraska. Because it is our duty, the duty of my office, to defend these claims brought against the state, that is why we are opposed to any erosion of LB325. Son-- sovereign immunity isn't just a concept. It's a fundamental protection of taxpayer dollars and it's fundamental to the ongoing operation of our government. Claims against the government are paid by the taxpayers who fund our government, and long-standing principles of sovereign immunity, stretching centuries and applying to all 50 states, along with the federal government, limit claims for damages against the government only to those specific circumstances where the Legislature has made a policy decision that the taxpayers should be financially responsible for the tortious conduct of certain individuals. Current law does not permit a claim against the state where the claim arises out of assault, battery, the-- the traditionally referred-to atten-- intentional torts. But it's important to note that the list provided in statute, the intentional tort list, that's not a-- a-- a limit. There are more intentional torts. One of the concerns that we have with the way that LB325 is written is that it just refers to intentional torts. It doesn't specifically use the language of current statute. So you're expanding it to a whole bunch of other types of claims that are not currently waived, are-- are not currently provided for in the State Tort Claims Act. Running out of time, so I'm going to skip ahead here. First, I want to talk about Moser and the Terry Berry case. That is an example of a situation that-- tragic, tragic results. And Senator DeBoer, you did provide a summary and I believe the introducer provided some information about that. But that's also a situation where there was a remedy provided. The Moser case was-- it-- it was the termination of a ca-- of the tort claim liability. But then the Moser family turned around and sued the state in 1983, and that claim was eventually settled and paid by the state. So it's important to understand because that is always the poster child for why this law needs to be changed, but-- and that is a situation where-- and a very tragic situation it was, but the system worked. 1983 was there is a remedy. There was a demonstration that the state felt was justified settling the claim and the claim was settled and payment was made on behalf-- by the state on



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behalf of the family. So I see that my light is red. I'll answer any questions.

**DeBOER:** Thank you very much. Are there questions for this testifier? I have a question for you then. Maybe this will spur some others. We'll see. The Attorney General's Office doesn't make the decision about whether or not sovereign immunity should apply in a situation or not. That's the decision of the Legislature. We passed a law about sovereign immunity, about the Tort Claims Act. Correct?

**JENNIFER HUXOLL:** This-- the Legislature makes the policy decisions about when sovereign immunity should be waived. That is correct. Once those decisions are made and the law is passed, then my-- my office represents and will--

**DeBOER:** So you interpret--

**JENNIFER HUXOLL:** We use every defense that we have--

**DeBOER:** --and you would--

**JENNIFER HUXOLL:** --in order to represent the state and the public fisc.

**DeBOER:** Yeah, great. So you will enforce whatever decisions that we make about-- as a body about what sovereign immunity should or shouldn't be.

**JENNIFER HUXOLL:** I'm not sure "enforce" is the right term.

**DeBOER:** I'm sorry.

**JENNIFER HUXOLL:** I represent the state and I assert all defenses available to me on behalf of the state when we get sued.

**DeBOER:** OK. So if we change it and say no sovereign immunity at all, you all would represent us to the best of your ability in that circumstance.

**JENNIFER HUXOLL:** Yes, I'm going to need many more lawyers.

**DeBOER:** [LAUGH] Probably. If we said absolute sovereign immunity, we still wouldn't get rid of all the lawyers there, so you'd still have a job, but you would do that as well.

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**JENNIFER HUXOLL:** Correct. We would still have many claims that are outside of sovereign immunity. Those are all provided by statute.

**DeBOER:** Right. OK. So the decision on where sovereign immunity is or isn't rests with us. You all have to deal with the consequences of our good or bad actions in that way.

**JENNIFER HUXOLL:** That's correct, as do the taxpayers--

**DeBOER:** Yes.

**JENNIFER HUXOLL:** --who pay the judgments--

**DeBOER:** Yes.

**JENNIFER HUXOLL:** --which you have to appropriate later when the claims bill comes--

**DeBOER:** Yep.

**JENNIFER HUXOLL:** --and those claims have to be paid.

**DeBOER:** Yeah, which is why I like when we have oversight, so we can make sure that we're seeing all the places where we might run into liability, so that we can see whether or not we might have more claims. So the decision about whether to apply it is ours, so I guess I'm kind of curious why you're here in opposition to a bill since the policy part of this is-- is really for us to decide. So I guess I-- I don't really know why you're in opposition to this bill. This is a thing that we've been talking about more and more, is, why are people coming in who are from the departments that are not the policy makers and coming in and opposing public policy that we're supposed to say-- to do? Are you saying you couldn't follow the statute as we-- as we passed it if we were to pass this?

**JENNIFER HUXOLL:** No, those are two different questions. We come to-- in opposition so that you can fully understand the consequences of what happens on these bills. If we come in a neutral capacity, it maybe provides you with the idea that there might not be significant consequences. And so I think for NIRMA, Ms. Johnson and the other entities who are here, it's important to us to communicate opposition because of the substantial amount of liability that you are potentially opening up with these claims. I'm not sure that the opposition or neutral or proponent is as important as what we say here--

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**DeBOER:** I--

**JENNIFER HUXOLL:** --and what we're saying here is that we--

**DeBOER:** I agree, but I-- I agree, but I think that you are the ones who are coming in and eventually you'll just have to deal with whatever we do. I mean, that's ultimately--

**JENNIFER HUXOLL:** That's correct.

**DeBOER:** That's the truth. OK. All right. Well, are there other questions? Did I spur any? I don't see any. Thank you for being here.

**JENNIFER HUXOLL:** Thank you for your time.

**DeBOER:** Let's have our next opponent.

**ELAINE MENZEL:** Good afternoon, Vice Chair DeBoer and members of the Judiciary Committee. For the record, my name is Elaine Menzel; that's E-l-a-i-n-e M-e-n-z-e-l, here today on behalf of the Nebraska Association of County Officials and Nebraska County Attorneys Association in opposition to LB325. We are in opposition for many of the same reasons that have been testified previously. I won't take up your time with those issues, and some of the concerns are outlined in the correspondence that is being passed out. But I will just note, for your rec-- for the record, that it was 1969 that the State Tort Claims Act and the Political Tort Claims Act and-- were passed and they were the result of an interim study. At the time, the-- that legislation included provisions related to the Intentional Tort Claims Act, similar to what appears in those acts today, and we would ask that you just not expand the provisions at this time and keep it not an act, LB325. If there's any questions, I'd be glad to answer them or attempt to answer them. How's that?

**DeBOER:** Are there any questions for this testifier? I don't see any. Thank you for being here.

**ELAINE MENZEL:** Thank you very much.

**DeBOER:** Next opponent. Any other opponents? Anyone testifying against this bill? Anyone here in the neutral capacity? Neutral? As Senator Dungan is coming up to close, I will note for the record that there are five letters, one in support and four in opposition.

**DUNGAN:** Thank you again, Vice Chair DeBoer and other members of the Judiciary. So I also want to-- well, I want to thank the other people who came in today to testify. These conversations are always complicated, and I think that we get really into the weeds about some very particular legal issues. I'll admit I was a criminal lawyer, not a civil lawyer, and so I probably don't even have the expertise as some of the people behind me. But one of the things that I think is important to just highlight from the 30,000 foot view is we're talking about we're talking about things that courts-- and I believe Vice Chair DeBoer pointed this out. We're talking about things that courts are designed to deal with and any time we limit an individual's recourse, I think it needs to be done with pause and it needs to be done with consideration of what the consequences of that action can be. There's a reason we have a Political Subdivision Torts Claim [SIC] Act. We want to make sure there's not frivolous lawsuits and, as the Attorney General stated, that we're not, you know, overburdening the system to such an extent that they have to hire a bunch more attorneys or anything like that. I'm very sympathetic to that. I know that a lot of attorneys in the-- in the state and in the county are overworked and sometimes underpaid, and that can be very difficult. But we have to balance that with the interest of the individuals that we're actually talking about here. And whether it's cases like the prison case that led to the Moser incident or the-- the case or if we're talking about students, as was, again, pointed out, the-- the students in special ed who sometimes have incredibly complicated situations going on and are subjected to things like the sexual assault that we were talking about earlier, we're talking about real people. And I just believe that when we balance those-- you know, a kid is a kid, somebody who's in the care of the state is somebody who's in the care of the state-- they should not be limited in the recourse that they have when it comes to being made whole and holding those political subdivisions accountable. When I explain to people how laws are-- are written out, when I'm talking to, like, a client, for example, when I'm talking as an attorney, I'll read a sentence like what we have in this law on page 3, line 13: When the harm caused by an intentional tort is a proximate result of the failure of a political subdivision or an employee of the political subdivision to exercise reasonable care. That's a really legalese-laden paragraph. But when you're looking at how these cases are determined by judges, what you explain is that they're broken down into elements. So there's different elements there that have to be proven. For example, an intentional tort has to exist in the first place; that's one element. There has to be a harm; that's another element. It has to be the proximate result

of something; that's another element. There has to be a failure to exercise; that's another element, and reasonable care. Those are all individual elements, and the reason I point that out is I don't believe this is going to lead to any major influx of frivolous lawsuits, nor do I believe it's going to lead to any sort of major influx of payouts that are going to harm the taxpayer. I understand that concern. We want to be fiscally responsible with taxpayer dollars. But this is not an easy standard to meet. Each and every single one of those elements have to be proven by a plaintiff when they bring this case. And-- and I point them out individually because I think it's very important for us to understand, in order to get to a judgment at the end of this, there's a lot of hoops that have to be jumped through, and the only way those hoops are going to be met is if a judge makes the determination that all of those things happened. And in a circumstance where the political subdivision fails to act with reasonable care to something that-- somebody they owed a duty to, if a judge finds that they did not fulfill their duty to a kid or to somebody that was placed in their care, then I do believe it's right as a state that we hold those individuals accountable in a reasonable manner. And so I would, again, be happy to answer any questions, but I would urge your consideration of LB325 on to General File.

**DeBOER:** Any questions for Senator Dungan? I do not see any, Senator Dungan. Thank you very much for being here. That concludes our hearing on LB325, which will bring us to our hearing on LB3-- LB341. Senator Halloran, welcome to your Judiciary Committee.

**HALLORAN:** Well, thank you for the warm welcome. Good afternoon, Vice Chair DeBoer and members of the Judiciary Committee. Thank you for this hearing. For the record, my name is Senator Steve Halloran, S-t-e-v-e H-a-l-l-o-r-a-n, and I represent the 33rd Legislative District. Excuse me. I bring for your consideration LB341 to adopt the State and Political Subdivisions Child Sexual Abuse Liability Act and exempt actions from the State Tort Claims Act and Political Subdivisions Torts Claim [SIC] Act. Child sexual abuse is a plague that takes place across all sectors of our society. It infests not only our private youth-serving organizations such as daycares, Scouting organizations, churches, hospitals, summer programs, sports clubs, among others, but also it infests our public institutions such as our public schools, child welfare system, and juvenile justice system. And while child sexual abuse is prevalent across society in both public and private institutions, our laws fail to provide justice, equity and fairness to all victims. Nebraska law provides rights to certain victims while denying rights to other victims.

Currently, the Political Subdivision Torts Claim [SIC] Act and State Torts Claim [SIC] Act creates immunity for public institutions for, quote-- quote, any claim arising out of assault, end of quote. This is part of what is called, quote, intentional torts exception, end of quote, which can be found in Nebraska Revised Statutes Section 13-910 and 81-8,219. In layman's terms, this means that a child who is abused in a public institution is unjustly prohibited from filing a civil lawsuit against a public institution. But a public institution, which, for example, has failed to adequately supervise or train its employees or has failed to swiftly respond to suspicious grooming or abusive behaviors, should not be allowed to do so with immunity. LB341 proposes a remedy to this basic and fundamental inequity in our laws by stating that claims related to child sexual abuse are not subject to the two court-- two tort claims act. This bill creates a separate State and Political Subdivision Child Sexual Abuse Liability Act. This act mirrors the current standard for private institutions' liability when they engage in the same wrongful behavior, which can be found in Nebraska Revised Statutes Section 25-228(1) (b). This standard is that a person may bring a claim related to child sexual abuse for 12 years after they turn 21 years old. In short, three-- in short, LB341 treats all victims equally when it comes to holding a third-party, public or private, institution responsible for their wrongful actions. So let's talk about why this is needed. In 2004, Dr. Charol Shakeshaft published a report commissioned by the U.S. Department of Education entitled "Educator Sexual Misconduct: A Synthesis of Existing Literature." Shakeshaft found that nearly 10 percent of students are targets of educator sexual misconduct sometime during their school career. In her estimation, she found that in a given year, more than 4.5 million students are subject to sexual misconduct by an employee of school sometime between kindergarten and 12th grade. This data is consistent with a 2017 case study issued by the U.S. Department of Justice. The scientific studies are made more real through the investigative reporting of the media. In 2007, the Associated Press, AP, ran a three-party [SIC] story in which it found more than 2,500 cases of child sexual abuse over five years that were reported and led to disciplinary action against the educators. Although the investigation recognized the count-- countless educators who are faithful-- faithfully devoted to education of children, the investigation revealed a number of abusive educators, which speaks to the larger problem in a system that is stacked against the victims. The AP investigation recognized that clergy abuse has been a part of the national consciousness, but there-- that there has been little sense to the extent of educator abuse. As Dr. Shakeshaft has asserted,

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the physical sexual abuse of students in schools is likely more than 100 times the abuse by priests. And to be clear, my coming here today is not meant in any way to defend the historical clergy sexual abuse problem. It is meant to help us recalibrate our senses of this issue so that we can see the whole problem for what it is and find just solutions for all victims. Similar to the AP investigation, our own World-- Omaha World-Herald published a hard-hitting story in 2019 that revealed 56 educators who were linked to sexual misconduct, leading to the abuse of at least 74 students, 4 recent high school graduates, over a 14-year period. Important to note, the World-Herald report recognized that there were only the cases that appeared in discipline records. They found that disciplinary action isn't immediately or always taken against a perpetrator. The article also conveyed the fact that many cases of child sexual abuse go unreported, meaning that the actual number of Ne-- of Nebraska victims during that period could be in the hundreds. As Brian Halstead, the deputy commissioner of the Nebraska Department of Education, was reported to say: We have no way of knowing to what degree misconduct may be underreported. As a 2017 case study issued by the U.S. Department of Justice reports, victims of school employee sexual misconduct span most demographic characteristics. Those students who are low income, female, and in high school are most likely to experience sexual misconduct by a school employee, and students with disabilities are most likely to experience school employee sexual mis-- misconduct than students without disabilities. Similarly, Dr. Shakeshaft found that students of color are overrepresented as targets of educator sexual misconduct in their representation in the sample. Without going into all the details, the list of emotional, physical and social and psychological trauma that accompanies child sexual abuse is extensive. Child sexual abuse not only takes a personal toll on the victim and their family, but its public health and economic costs are not to be underestimated. This case study also finds that, contrary to common conception, school employees, sexual misconduct offenders, are typically popular and are often-- have been recognized for excellence. Offenders include all types of school employees, such as teachers, school psychologists, coaches, principals and superintendents. Citing a 2010 Government Accountability Office report, the case study finds that one teacher offender can have as many as 73 victims. As well, a teacher-offender can be transferred to three different schools before he or she is reported to the police, a practice called "passing the trash." The case study also finds that schools and their employees have serious problems with the failure to disclose abuse, as well as problems with compromising investigations. But the problem of child sexual abuse in

public institutions is not reserved to public schools. It is found elsewhere. In 2017, Nebraska's Inspector General of Child Welfare Julie Rogers released an investigative report that reviewed cases of child sexual abuse in the state's welfare system and juvenile justice system. Over the three-year period from 2013 to 2016, Inspector General Rogers identified 50 children who were victims of sexual abuse that had been substantiated. Like Shakeshaft and the USDOJ data, Inspector General Rogers' report found that one in ten children will be subject to sexual abuse. She also found-- noted that youth in the child welfare system are at a higher risk of experiencing sexual abuse and exploitation than their peers in the general population. In fact, the research estimates that youth living without either parent, including foster care or residential facility, are ten times more likely to be sexually abused than youth living with both parents. In addition to documenting far too many reports of sexual abuse of children in the care of the state, the report revealed first, and I quote, harmful attitudes about the perception of both child sexual abuse and children in the state's care among state employees that left the child welfare system unable to effectively prevent and respond to child sexual abuse of youth in its care; second, repeated instances of a lack of reporting, as well as investigations that were not conducted in a timely or effective manner; third, and I quote, system-- system in-- interventions that were unable to protect youth and had, in fact, made them more vulnerable to sexual abuse; lastly, in-- in, quote, several deficiencies with how foster adoptive and guardian homes are chosen and prepared to care for children, to ensure that placements are safe and suitable for children, end of quote. These findings clearly demonstrate not only that child sexual abuse is occurring with frequency in our public institutions, but also that our public institutions and their employees, to whom the care of our state's children have been entrusted, are far too often failing to protect children. If this year's hearing is anything like last year's, you are going to witness a small army of organized organizations and associations representing public entities opposed to this legislation. I, of course, encourage you to listen carefully to their arguments. I have found their arguments against LB341 wholly inadequate, deeply concerning, and often disingenuous. You will hear that victims of child sexual abuse can already bring claims against the state or political subdivisions. But when you listen closely and carefully, it becomes clear that those claims can only be brought when there is, quote, deliberate indifference by the state or its political subdivisions. This standard, however, is not fair or just to the numerous situations where the state or its po-- political subdivisions



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have been guilty of negligence. You also hear that this undermines, dissolves, or subverts the sovereign immunity of government entities. But at the end of the day, that is a policy decision for the Legislature to make, and in this instance, it is for providing equity to the victims who have experienced the evil of child sexual abuse at the hands of and in the care of government. You also hear arguments like this will cost us money or it will require higher insurance premiums or the standard is unfair. These are far from being arguments against the bill. If anything, these arguments are evidence that the problem is perhaps deeper than I already articulated. In addition, we wouldn't be-- we wouldn't for one second accept these arguments in any other context where private entities have been liable, most especially where child sexual abuse is involved. At the end of the day, LB341 would ensure that our public institutions are held more accountable and responsible by ensuring they can be held legally liable for their failings. This approach would complement LB991, which I brought in 2020 to address sexual abuse in our schools, and would also complement recent steps that this committee and our Legislature have taken over the last several years to help train, educate and prevent child sexual abuse in our public institutions. LB341 is intended to provide justice, fairness and equity for all victims. If we want to give justice to victims of child sexual abuse, then they should be treated fairly and equitably across the board. We cannot have a two-tiered justice system that treats victims who experience their abuse in public institutions as second-class citizens. They, like victims who experience their abuse in private institutions, deserve their day in court when their public institutions have failed them. This concludes my testimony and probably my voice for LB341 for the day. I would be happy to answer, to the best of my ability, any questions the committee may have about this bill. Thank you, Chairperson DeBoer and members of the committee.

**DeBOER:** Are there questions for Senator Halloran? Senator Geist.

**GEIST:** This just only applies, correct, to public schools, public institutions, but not private, correct?

**HALLORAN:** There-- there are laws in place right now that accommodate dealing with the issue of sexual abuse for private-- in private institutions.

**GEIST:** In private schools.

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**HALLORAN:** So this is exclusively for allowing parity or equity for the same type of sexual abuse to be subject to lawsuit with public institutions.

**GEIST:** OK. Thank you,

**DeBOER:** Senator Blood.

**BLOOD:** Thank you, Vice Chair DeBoer. I have several questions, but they're easy questions. So didn't you have this bill before?

**HALLORAN:** I did. It was LB--

**BLOOD:** OK, I thought I remembered that--

**HALLORAN:** --LB1200, I think it was.

**BLOOD:** And, see, I actually do read your bills. And so-- so was the motivation for this bill, based on what I remember, because a series of Opinions had come down from the Supreme Court that allowed this type of immunity, even if it-- even if it was like-- infringed on the employees' rights or that-- that it-- wasn't this because of-- of how they ruled in the Supreme Court, your first bill, your last bill, or is that just my imagination, where they basically said that-- that this type of immunity is allowed in-- in public schools? Do you remember that? Because it happened in the same window of time. Is that why that-- where that bill came from originally?

**HALLORAN:** Don't know that that was necessarily the-- what spur--

**BLOOD:** Not the motivation?

**HALLORAN:** --what spurred the bill so much. And I don't know if you're talking about, and you'll hear that in following testimony, but some-- some will say that there is-- that victims have existing remedy--

**BLOOD:** I'm sorry, I can't hear you.

**HALLORAN:** Beg your pardon.

**BLOOD:** This is the worst room.

**HALLORAN:** Well, it's-- my voice is breaking. Some behind me will argue that victims have an existing remedy that is actionable against the state or local governmental entities by asserting claims under 42

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U.S.C. 1983. However, U.S. [SIC] 1983 has a deliberate indifference standard. I don't know if that's what you were referring to.

**BLOOD:** Yeah, there was like something about the time that I-- and I thought at the time of your last bill that it-- the motivation was what the Supreme Court had ruled, that it was like to counter that, so maybe that's not exactly what happened. And I'm going through some old notes, so-- but here's one of the concerns I have, is that, like I read the bill and I like the bill, but then I started getting these emails where people were talking about how schools are sexualizing children. I got multiple ones that said that, and there was a theme of like some real hostility towards teachers, and so that's one of my concerns. Is that part of the reason we have this bill today?

**HALLORAN:** It's not from my perspective. That's not why I'm bringing this bill, no. On a daily basis or at least a weekly basis, in spite of what's being done, what, what events might be taking place in public schools with regard to what's being taught, that's not what's bringing this bill. What's bringing this bill is on a weekly basis somewhere in the country and not uncommonly in the state of Nebraska, you will find instances where children have been abused or caught abusing-- sexually abusing children in their care. That's what's drive-- motivating me to bring this bill.

**BLOOD:** But they can still be criminally prosecuted, yes?

**HALLORAN:** They can be criminally prosecuted, but not civilly.

**BLOOD:** OK. Thank you.

**DeBOER:** Thank you, Senator Blood. Other questions? Senator Halloran, one quick, direct to-the-point question. Under your bill, you'll change the situation which now exists under law, that if a child is abused by his or her teacher in a public school, right now can't sue under state law. If they're--have the same abuse in a private school, they can sue under state law.

**HALLORAN:** Correct.

**DeBOER:** So this makes our public school kids have the same remedies as our private school kids, notwithstanding federal law in Section 1983, but under state law.

**HALLORAN:** That's correct. It creates, it creates parity.

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**DeBOER:** Under state law--

**HALLORAN:** Under state law.

**BLOOD:** --for our children.

**HALLORAN:** Right. Thank you.

**DeBOER:** Thank you.

**HALLORAN:** Very well said, Senator.

**DeBOER:** Thank you.

**HALLORAN:** I should have had you close for me.

**DeBOER:** All right, any other questions for Senator Halloran? I do not see any. First proponent testifier.

**ROBBIE ADAMS:** Hi, my name is Robbie Adams, R-o-b-b-i-e A-d-a-m-s. I am from Papillion and thank you so much for this opportunity to testify. I support LB341 because there should be no immunity from-- liability for employees who in the workplace or at a sanctioned agency events commit crimes such as sexual abuse. I am particularly interested in how schools neglect to do training against sexual abuse by school administrators, teachers and other employees. New statistics have shown that the commission of sexual abuse by teachers is up to 100 times worse than that of Catholic priests in the United States. The Biden administration is working in tandem with teachers unions at the present time to obstruct parents and members of the public from obtaining data about the number of school employees and teachers who are suspected of or commit sexual abuse on the job. This will allow these criminals, some of whom are pedophiles, to move from school to school to re-offend unless they are successfully prosecuted and have their licenses removed. I am an expert on the damage a teacher can inflict on a young student by sexual abuse. I now know that I was groomed for abuse for over two years as a middle school student with special privileges and attention. And then I was set up for a sexual attack early in my-- after-- or I was stood up for a sexual attack early in my freshman year of high school at the age of 14. Immediately after the attack, while I was shaking with shock, this teacher whined that if I told anyone he would be fired. He also told me that he would tell my mother that I cooperated with his actions and how disappointed she would be in me. This man was both a teacher and a coach so my world was affected both at school and after school. Sadly, as an adult

with my own family and children, this teacher stalked me repeatedly until I finally had enough when he stalked me at my mother's funeral. I had much healing by then to successfully get a restraining order against him. I filed criminal complaints against, against him with county sheriffs even though I was years after high school. I comforted myself with the fact that he would be served the restraining order by a sheriff in his home in the morning in front of his wife. In those days, there were no sexual abuse hotlines for help. No one talked about these issues. No schools trained personnel about sexual abuse and the consequences of such actions. There was no holding schools accountable for their lax supervision of employees. Please help stop the victimization of Nebraska's children and set bold standards to help victims get justice and accountability for these devastating crimes that take a lifetime from which to heal. Pedophiles find schools a perfect place to victimize children. Please vote LB341 out of committee and into legislation. Thank you.

**DeBOER:** Thank you for your testimony. Are there questions for this testifier? Senator Blood.

**BLOOD:** Thank you, Chair DeBoer. Thank you, first of all, for sharing your story. I know it's never easy to do that. I unfortunately have a question so I apologize. I hate to do that when someone has shared such a personal story. But you referenced something that President Biden is trying to reverse something. Can you be more specific?

**ROBBIE ADAMS:** Yes.

**BLOOD:** What are you talking about?

**ROBBIE ADAMS:** Excuse me. There are currently rules being-- in the comment period to remove the data that has been held from 2015 until now to remove the data about sexual abuse, allegations of sexual abuse and, and any criminal proceedings about teachers. Removing that from the data set so that we will no longer know how the-- how many teachers are abusing children or accused of abusing children. And that, that rule is currently in the comment period.

**BLOOD:** Can you tell me-- I, I'm a little confused. What organization or-- because I've, I've been just briefly searching for it and I'm not finding it anywhere. Can you give me a little bit more detail so I can actually find it?

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**ROBBIE ADAMS:** I can't because I don't have it in my notes here today, but I can send it to your office. I can email you that.

**BLOOD:** Can you tell me what organization that this is going through, what level of federal government? What is the--

**ROBBIE ADAMS:** It is something having to do with education and I'll email you the reference.

**BLOOD:** All right, thank you.

**DeBOER:** Thank you, Senator Blood. Other questions for this testifier? Thank you for being here. Next proponent. Welcome.

**HEATHER SCHMIDT:** Thank you. My name is Heather Schmidt, H-e-a-t-h-e-r S-c-h-m-i-d-t. I am a proponent of LB341. As I understand it, LB341 allows the same window for victims of sexual abuse to file civil claims against their perpetrators and the public institutions in which the abuse occurred as victims in private institutions. It is unbelievable that we are even having this debate. There is no world where this is normal. Right now, Nebraska allows sovereign immunity to public institutions and agencies; sovereign immunity, meaning a sovereign government cannot be held civilly liable without its consent. We rely on you, our senators, to oppose any form of immunity for any institution where the safety and well-being of children is entrusted. To protect the institution over the individual further enables the perpetrators of child sexual abuse. The case of Jeremy Bell, a child who had been sexually abused and ultimately murdered by his teacher, Edgar Frederichs, in 1997, was the very reason for bipartisan national legislation passed in 2015. Kyle Ewinger was passed around Iowa schools before being sentenced in 2018 for the serial rape of a boy in Nebraska. In 2019, four school districts in Iowa settled a lawsuit with one of his other victims. I have provided you with his-- the attorney statement. When asked about the Kyle Ewinger case, Amos Guiora, professor of law at the University of Utah, said, this is Jeremy Bell with the fortunate difference that no boy was killed. I have included some information about Amos's work on the bystander initiative. Senator Halloran has the entire article, which was just posted Wednesday if you would like to read more. Accepting lesser consequences for bystanders and enablers in the public sector over the private sector only contributes to the institutionalized failure to keep children safe. Won't that make public institutions even more desirable to the monsters who sexually abuse children? Many of these situations-- institutions were set up and are funded to

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provide for children's health and safety in the first place. If we allow them to be exempt from the same consequences for failure the private institutions receive, then we have lost our purpose. As parents, we are mandated to send our children to school. Failure to do so will result in state actions against us. The state licenses those who teach and care for our children. The majority of our children attend public schools, some because they don't have any choice. We are not mandated to have our children attend church, scouts or athletic clubs. It is precisely for this reason that the state should not be allowed sovereign immunity. It is unconscionable to mandate required attendance and not allow for equal access to justice. Title IX doesn't protect-- adequately protect children in these circumstances. Title IX investigations are handled by the very institutions that this bill would hold accountable. Nebraska needs to pave the way for families to sue in civil court, thereby sending a warning to all school districts not to take on a financial viability. Red light.

**DeBOER:** Thank you. Are there questions for this testifier? I do not see any. Thank you so much for being here.

**HEATHER SCHMIDT:** All right, thank you.

**DeBOER:** Let's have our next proponent.

**CAMERON GUENZEL:** Senator DeBoer, senators, my name is Cameron Guenzel. Again, C-a-m-e-r-o-n G-u-e-n-z-e-l. I am again testifying on behalf of the Nebraska Association of Trial Attorneys. I am an attorney practicing in Nebraska and here to talk to you about what I believe to be our collective duty to prevent one of the most greatest crimes possible. That is the sexual assault of minors. I represent a child whose public school failed to protect her. Over the span of many months, her teacher targeted, groomed and raped her repeatedly. Most shockingly, the acts of rape occurred at times and places that could have been prevented by the school if the school had employed even the slightest degree of concern. I hope and pray that my client may one day find healing, but it is not an exaggeration to say that my client's life at present is ruined. She ran away from home, attempted suicide four times and spent six months in group homes. She was never able to return to her school. Today, you are faced with the basic question: whether a public school or public institution should be immune under the law when they have the opportunity, yet fail to protect minors from sexual assault. To oppose this bill, one must believe that public institutions, for example, schools, are less capable of safeguarding children from rapists than a private school.

Or that they should escape consequences when they fail to protect children. Or that the children themselves are less deserving of redress because they were raped by a public servant rather than a private citizen. There may be times when public entity should be granted special immunity, but this is not a situation of budget concerns or balancing competing societal interests, but the inescapable fundamental duty to, to safeguard children. The objection will be raised, and I'm sure shortly, that this bill will increase taxes. The idea that a raped child is too expensive should repulse us. I find the reality that my client alone carries the burden of these heinous acts, the trauma, the pain, the suffering, to be morally repugnant. If a public entity does not want to be sued, it should protect those in its charge and serve-- supervise those it employs. It's true that frivolous or false lawsuits do sometimes occur, but this is not crippled private industry and there's no reason to believe it would do so to the government. Good procedures and safeguards protect not just children against being victimized, but also against false claims of victimization. In my client's case, she was left alone with a teacher many times under alarmingly inappropriate circumstances. Perhaps if the school had a bit more incentive to supervise its staff, one girl's life would be very different today. For these reasons, I implore this body to support LB341 and tell every Nebraskan that we have no higher goal than protecting our children.

**DeBOER:** Thank you. Are there questions for this testifier? I do not see any. Thank you for being here. Next proponent.

**ELIZABETH DAVIDS:** Hi, my name is Elizabeth Davids, E-l-i-z-a-b-e-t-h D-a-v-i-d-s. Good afternoon. I was going to share a testimony that was given a number of years ago when the Colorado Legislature was considering a similar bill. The testimony was given by Terri Miller, the president of Stop Educator Sexual Abuse, Misconduct and Exploitation, otherwise known as SESAME, Incorporated. But I changed my mind and printed it out for you to read instead because I just wanted to get on public record loud and clear what the current situation is. And Senators DeBoer, I really appreciate you breaking it down for us everyday people. Most of us are not lawyers and we're not used to reading legislation so I appreciate your explanations. So I'd like the parents to listen up. As the lawyer-- as the law stands right now, if my child were molested or sexually assaulted or abused or raped by a staff member when they attended a public school, I would not be able to legally hold that school or school district accountable through a law suit and report. As the law stands right now, if my child attended a public school and a staff member assaulted and



molested, raped or otherwise abused my child and the school administration found out about it and simply moved the staff member to a different school without any other punitive recourse, I could not sue that school or that school district. As the law now stands, if my child attended a public school where they were assaulted, molested, raped or otherwise traumatized, the school doesn't have to criminally charge that adult staff member who took advantage of their authority and harmed my child. They can just pass the trash and move that staff member to a different position or a different school. And I cannot sue that school or school district not only to hear from my traumatized child's needs, but also to make an example of the predatory staff member and delinquent school administrators so they can-- so they will never do this again. I think I'm getting that correct. But magically, if my child went to a private school, if my child went to a religious school and then the same kinds of trauma occurred to my child at the hands of a staff member, then magically I have the right to sue that private school and private school district. In what universe does this make any sense and seem fair and equitable? That the vast majority of schools that our children attend in our state, taxpayer-funded public schools have sovereign immunity, meaning that their backsides are legally covered and they have far less legal requirement to keep their staff members above reproach of harming children, but the private schools are held to a higher standard legally is not only embarrassing but abhorrent. I will be curious to hear what the arguments the opponents to this bill have considering this bill simply levels the playing field and makes all schools equally responsible to protect their students from predatory staff members. Will they say, as they did last year, that it is too expensive? If that's their, if that's their tact, then I would like them to emblazoned that on their school buildings above the entrances. Keeping your kids is too, keeping your kids safe is too expensive for us, so we'll just move the predators to another kid's school. Please make my kids safe. Please make your kids and your grandkids safe.

**DeBOER:** Thank you for your testimony. Are there questions? Thank you for being here. Next proponent.

**WARD GREISEN:** Good afternoon. My name is Ward Greisen. That's W-a-r-d G-r-e-i-s-e-n and I strongly support LB341. Protecting children from sexual abuse is something everyone should be on board with. With state agencies, there should be liability when they fill-- fall short of properly protecting children-- specifically, I'll say in public schools-- should be liable. Last year, I saw a matrix that the State Board of Education had on their website titled, "Annual Safety

Requirements for Schools." On this matrix lists-- sexual misconduct and sexual harassment were listed, that both of them on the matrix was listed to have policies for, meaning schools should have policies to address both those items. However, neither one had listed as required training. So basically they would have a policy but not trained to it or were not required to train to it, nor were they required to look at the policy annually and review it to see if it still made sense. So basically, a school can develop a policy and throw it in a drawer and never look at it again. So obviously that doesn't make sense. How would an educator, you know, staff, otherwise, you know, know what's expected of them? Nor would-- how-- why would the school actually monitor toward to making sure that the sexual assaults and abuses and things like that were not occurring? There's nothing there that would require them to do so. So now compare that to youth sports. When my kid-- when I-- my kids were young and I volunteered to coach, I had to go through back--background checks. I had to go through SafeSport training, which covered those topics and we had to do that annually. So why the difference? There shouldn't be any difference. Research shows that sexual abuse is on the rise in our schools. One such review showed that sexual misconduct is happening at least one case a day across the country here so it is very prevalent. We know what's happening in the state of Nebraska so we need to put actions in place. We need to be proactive instead of reactive in reacting to after an assault happens. We need to be proactive and this bill would be one step in making sure that our educators and our school systems are proactive. There is a concern. Yeah, as a taxpayer, I'm concerned that this would cause more taxes, right, if all the schools are sued or whatever. However, we entrust our schools to be good stewards to our funds already. We expect our schools and our administrators to handle our taxpayer dollars well. So it really shouldn't change with this bill. We would expect them to make sure they put safeguards in place so they don't get sued and that's the whole point. Anyway, so in conclusion, I definitely support this bill. I hope you guys do as well and get it out to-- onto General File so thank you.

**DeBOER:** All right, thank you for their test-- for your testimony. Are there any questions for this testifier? I don't see any. Thank you so much.

**WARD GREISEN:** Thank you.

**DeBOER:** Next proponent.

**LOREE WOODS:** Good day and thank you for sharing my testimony. My name is Loree Woods. It's spelled L-o-r-e-e W-o-o-d-s. I'm here today to urge you to support LB341 on behalf of my special needs daughter, Taylor Woods, with whom I have permission to tell her story. Ultimately, LB341 has become very personal to me and my family because it will remedy equality for all victims of sexual assault/abuse. You see, my daughter was left with no recourse after she was sexually assaulted by another student during-- due to the result of neglect by Lincoln Public Schools. Taylor was born March 28, 1997, with special challenges. She's sweet, happy, fearless, loving and outgoing. To no surprise to us, she became a beautiful, strong, trusting young lady with a contagious laugh and plans for the future: graduate, get a job, move out to an apartment with staff and her peers. To facilitate her future employment with special needs, LPS students participated in vocational opportunity in community experience, or the VOICE program. On October 10, 2016, Taylor's life was changed forever. On that day, LPS experienced a staff shortage in the VOICE program at Abel Hall on the university campus. LPS knew the VOICE program would be understaffed on October 10, but proceeded without meeting staffing needs, ill equipped to deal with the group of special needs students as a result of understaffing. Four students were left unattended. My daughter, Taylor, and another student with an IEP required con-- who required constant supervision due to a history of inappropriate touch, inappropriate language, personal space issues and general misbehavior. This student, whose propensity for inappropriate touching and behavior warranted and required constant supervision, took my daughter to the 13th floor of Abel Hall and sexually assaulted her until Taylor fought back as best she could saying, no, you hurt me , you're bullying me. Ironically, the VOICE program was supposed to assist Taylor in becoming more independent. Instead, the neglect by LPS and the teacher formatively set her back a lot, just a lot. It was very damaging to her. She has flashbacks still, physical, sexual-- physical and mental pain, PTSD. We had with our attorney put together a solid case that we knew would, would stand due to Mosher v. State. Just weeks before the decision, our daughter's case was thrown out. School districts need to be held-- should not be immune to negligence. Clear changes to the statute-- OK so just one last thing really quick. However, I promised my daughter, Taylor, because she that no justice, no accountability, that I would fight for her and for those who do not have a voice and the ability to fight back, to ensure that no parent, family or other child has to go through what she's had to go through and what we've had to go to. I strongly encourage your support for LB341 and I would take any questions.

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**DeBOER:** Thank you for your testimony. Are the questions for this testifier?

**LOREE WOODS:** One last quick thing. So it's been six and a half years and the day that Senator Halloran's office called, we were on a Zoom with her psychol-- psychiatrist who we still see every two weeks. And just this past weekend, which it happens quite frequently, she still has night terrors from the experience that's just haunted her forever. But we are just moving forward one day at a time, so thank you for hearing.

**DeBOER:** Thank you. Next proponent.

**JEANNE GREISEN:** Hello. My name is Jeanne Greisen. It's J-e-a-n-n-e, last name is G-r-e-i-s-e-n, and I want to thank Senator Halloran for bringing this bill forward. And I'm urging you all to vote and get LB341 out of committee. However, I would like an amendment to be added to this that it does not go far enough, that even though I do want sexual abuse to be able to be the liability on these institutions, but I also feel like physical and emotional abuse also needs to get added to this bill. Because that is happening to these children and they're being permanently harmed, even driven to suicide by the emotional abuse that's happening to them. And what I've given to you is a case that's going on right now. It's Crozier versus Westside High School. The parents of this child have been fighting for this-- for justice for her daughter for seven years because of what happened to her when she was in junior high by a teacher. And it's the same thing that Senator Halloran has talked about is that this girl was emotionally targeted, singled out to the point that she tried to commit suicide twice. And now this is in a federal court in Omaha and my heart was pulled in this direction to go and follow this case. And so because it's still ongoing, I wanted to find more information with the Department of Education. And as I filed a FOIA, they said there was nothing there. They had nothing on this case even though I have evidence to show that there was a case, but I was given false information from the Department of Education. So if they're a public entity as well, they need to be held responsible for not giving out information regarding cases like this. And again-- and then the teacher that was involved in this case got moved to another school. And if I was a parent at Ralston High-- at Ralston Middle School right now, I would want to know what's going on with this teacher. But now this teacher is there that she can do the same thing to other junior high children. So let's talk about mental health. So that's-- everybody wants to talk about that right now, whether it be at the

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University of Nebraska or the public education system. That's-- everybody's target is, oh, let's throw money at mental health. How about let's get to the root cause and actually be letting these institutions be sued if they're harming children and creating the mental health. This teacher created the mental health issue in this, in this student when she was in junior high. Just a little brief synopsis of what happened to this girl is because she stood out for her beliefs and the teacher didn't like it because it went against the narrative. So the teacher targeted her. She was not at school so the teacher slandered her, made it impossible to her-- for her to even stay at school. And she was bullied by other students. The teacher went so far as to say that she wrote-- when the mom said she was-- the daughter was racist, the teacher said she rolled her eyes and smugged. She doesn't believe that she was unfair to call this girl a racist.

**GEIST:** Excuse me--

**JEANNE GREISEN:** So this is a huge case.

**GEIST:** --we have to observe the light. I--

**JEANNE GREISEN:** Sure.

**GEIST:** --you'll probably get a question from someone to let you--

**HOLDCROFT:** Can you--

**GEIST:** See there? Senator Holdcroft.

**HOLDCROFT:** Thank you, Vice Vice Chair Geist. Would you like to go ahead and finish your story, please?

**JEANNE GREISEN:** She just went through emotional distress, anxiety. She had to get pulled out of the school. She eventually wanted-- she's in college right now. She wanted to go into law enforcement, but that is impossible now because she has been deemed a racist and it was all, all started by this teacher who has not really been reprimanded and is still teaching children.

**HOLDCROFT:** Thank you very much.

**JEANNE GREISEN:** Yeah.

**GEIST:** Thank you. Are there any other questions? Oh, would-- I'm sorry. Would you give us the spelling of your name, please?

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**JEANNE GREISEN:** Oh. Yeah, J-e-a-n-n-e, last name is G-r-e-i-s-e-n.

**GEIST:** Thank you. Thank you very much. Are there any other proponents? Any other proponents? Are there any opponents? Good afternoon.

**CHUCK WILBRAND:** Good afternoon. My name is Chuck Wilbrand, C-h-u-c-k W-i-l-b-r-a-n-d and I'm a partner here at Knudsen Law Firm and I'm here on behalf of the Nebraska Association of School Boards, ALICAP, the League Association of Risk Management and the League of Nebraska Municipalities. I oppose LB341 for these reasons. LB341 completely subverts the Nebraska Political Subdivision Tort Claims Act to the degree that if this law passes, none of the notice provisions, none of the caps or anything like that would apply. And under current law, Nebraska school districts and municipalities and cities are immune for any claim arising out of an assault, which includes sexual assault. However, there are still federal remedies: Title IX and Section 1983. Title IX does, does prevent sexual harassment. Under that, it includes sexual assault, whether it's done by student on student or by teacher on another student. And so this bill would be so broad enough that any sexual assault that occurs on any school district property or any city property, whether it's a playground, gym, park, any time of day, they could be held liable for that sexual assault. And what this is doing, it is, it is taking out 54 years of Political Subdivision Tort Claims Act that's been in effect so far and it doesn't create equitable results. I know that there's been a lot of testimony here saying that it's leveling the playing field between private entities and public entities, but those two entities are different. There's a reason there's a difference. There's a reason there is sovereign immunity. And so I will take any questions that this committee has for me.

**GEIST:** Oh, I'm in charge. Go ahead, Senator Blood. You can ask first.

**BLOOD:** Thank you, Senator Geist. So I heard you refer to Title IX and I-- we had a testifier earlier bring up something in reference to the-- I found what she was talking about. I just want to kind of verify this and that this sounds right to you. It's the U.S. Department of Education Office for Civil Rights, they referred to a-- what she was talking about referred to a November 19 proposal from the U.S. Department of Education's Office for Civil Rights, gives the false impression that the proposed change would have resulted in allegations of sexual misconduct going unreported to law enforcement and not being investigated. But the proposal referred only to the federal government's collection of data about such allegations. It did not eliminate all data altogether, only some statistics, and then it

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was actually withdrawn. In a new proposal put in place starting in December and it stated that the data will continue to be collected and that the agency is still going to retain those data elements and continue to collect all data. Does that sound right to you? Do you know?

**CHUCK WILBRAND:** I have not-- I have not looked at the recent proposals to-- changes to the regulations.

**BLOOD:** Yeah, it's my understanding that there's-- the window has already closed, that nothing is going to change, that they're going to-- that it was something that was put out falsely based on-- to the November 9 proposal. So I was hoping that you would know that. So sorry for the long explanation. I just want to make sure I was really specific on record, so.

**CHUCK WILBRAND:** OK. All right, thank you.

**BLOOD:** Thank you.

**GEIST:** Go ahead.

**WAYNE:** Any other questions for the committee? Senator DeKay.

**DeKAY:** Thank you. You stated right at the end of your testimony there is a reason there are differences. What are those reasons?

**CHUCK WILBRAND:** Well, I mean, there's-- the reasons between sovereign immunity, I mean, I guess I can-- I don't know how far of a history lesson that I can even give, if I even fully understand everything. But with sovereign immunity, there are-- you can't sue a political subdivision for the state unless this Legislature says they can be sued in these circumstances. And at large, it is to-- as been mentioned, you need to get-- you want to be able to run an efficient government. You know, whether that's they need to have discretion to run, whether they have discretion to arrest individuals, protect the general public and financial interests. And it-- I know that has been mentioned before about taxes and how we shouldn't hold taxes over the harm that is done to children. That is one of the reasons behind sovereign immunity.

**HOLDCROFT:** Thank you.

**CHUCK WILBRAND:** You're welcome.

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**WAYNE:** Any other questions from the committee?

**GEIST:** I have one.

**WAYNE:** Senator Geist.

**GEIST:** OK. All right, so if some horrible thing like this happens to a child, the family can criminally sue in court, correct?

**CHUCK WILBRAND:** The-- well, the family can civilly sue the individual that caused the sexual assault.

**GEIST:** OK.

**CHUCK WILBRAND:** Criminal prosecution can also be brought against that individual.

**GEIST:** OK and I know we're talking about the school or the entity that should have known or should have protected the child. So that's what we're going after here, right?

**CHUCK WILBRAND:** Well, the-- I believe that's what this bill is attempting to do is saying--

**GEIST:** OK

**CHUCK WILBRAND:** --in the context of the city or the school district, this was an employee of yours. We can sue you for that-- being an employee of that person or this happened by another student--

**GEIST:** Um-hum.

**CHUCK WILBRAND:** --we can then sue you under state law for it or--

**GEIST:** OK

**CHUCK WILBRAND:** --a third party came in.

**GEIST:** So there are several avenues here often. So one of the things that you brought up is that there is a federal remedy.

**CHUCK WILBRAND:** Correct.

**GEIST:** So is-- does that remedy have a different standard than what--

**CHUCK WILBRAND:** It, it--



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**GEIST:** --this remedy is doing.

**CHUCK WILBRAND:** It is not a simple negligence standard, but there are no caps on it like there are in the Political Subdivision Tort Claims Act.

**GEIST:** So it's similar to what we just heard in our previous bill, that it's-- it does-- it's not capped--

**CHUCK WILBRAND:** It's not capped.

**GEIST:** --and-- but the standard is higher.

**CHUCK WILBRAND:** It is a different standard, yes.

**GEIST:** OK. OK, so that might be an explanation of why some of the victims here might not have taken a federal route or--

**CHUCK WILBRAND:** It-- and I can't, I can't explain that. Whether-- because maybe they didn't explore Title IX. I mean, Title IX is a-- it's its own statute and you have to know it.

**GEIST:** OK.

**CHUCK WILBRAND:** But that-- I don't know why Title IX--

**GEIST:** So that's where Title IX comes in here. I'm sorry, I'm just trying to connect the dots of all of this. So that's where Title IX comes in that's been thrown around here that--

**CHUCK WILBRAND:** You're correct.

**GEIST:** --that they could, they could go to a federal court under Title IX with something.

**CHUCK WILBRAND:** For a school district, yes.

**GEIST:** OK.

**CHUCK WILBRAND:** Other municipality, they can go 1983. Private schools don't have to comply with Title IX because they do not receive federal money so they're not under the purview of Title IX.

**GEIST:** Oh, so a student who attends a private school doesn't have the opportunity to have a federal remedy?

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**CHUCK WILBRAND:** Not under Title IX, unless that private school has received federal money. But that's typically the reason of following Title IX is the receipt of federal--

**GEIST:** So that's where the playing field is not the same.

**CHUCK WILBRAND:** Correct.

**GEIST:** OK. Thank you. I needed that.

**CHUCK WILBRAND:** You're welcome.

**GEIST:** Okay.

**WAYNE:** Any other questions from the committee? Seeing none, thank you for being here.

**CHUCK WILBRAND:** Thank you.

**WAYNE:** Any other opponents? Opponents. Welcome to your Judiciary.

**BRANDY JOHNSON:** Chairman Wayne, members of the Judiciary Committee, again, my name is Brandy Johnson. I serve as general counsel for Nebraska Intergovernmental Risk Management Association, or, or NIRMA. On behalf of NIRMA's county members, I join in testifying in opposition to LB341. Sexual abuse, no, no question, is a terrible crime. I work with public employees and it's my belief that the vast majority of public employees out there, public employers, whether it be a school, a city, a county, they don't want criminals who commit sexual abuse to be public employees. For NIRMA's part, we work with our county members to develop policies and practices and training to try to, to prevent liability exposures and make public places safer. But we make our best efforts and we can't eliminate all crime. Abusers have criminal minds, criminal intentions. They're actively trying to hide their criminal acts. It makes it difficult to foresee, predict and stop the criminal act. We can't lose sight of the fact that the perpetrator of the abuse is, is the responsible party here and public employees-- employers are working diligently to prevent these crimes. They're often not foreseeable. I believe that many of the new cases that LB40-- LB341 would create could be defensible for public entities. But in the interest of what Senator DeBoer said earlier about this being a discovery process, I would just hope that when these cases are defensible and the government entity does prevail, the public has spent money on defending the case, the crime victim doesn't recover so it's essentially litigation for the sake of litigation. The

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victim doesn't recover. Public dollars are spent defending the claim. And this particular bill doesn't-- would eliminate any statute of limitations. So potentially, for the governmental entity, the evidence and witnesses to defend a claim could be gone so defense might be impossible. The amount of exposure to liability is really just completely unknown here because this is-- these are tragic cases. It's natural for judges and juries to try to find someone to blame other than the perpetrator. We may see public entities settling cases just to avoid the uncertainty of litigation, even when the crime wasn't foreseeable to them, especially when LB341 also removes any caps or limitations on money damages. You've all heard the term nuclear judgments likely in the news and often judges and juries don't have a full picture of the limitations that public entities face in the operations that, that they're conducting. Preserving the current state of the law keeps the focus on the perpetrator of the abuse and doesn't shift that burden on to the taxpayers. Except in those cases, as have been discussed, where the government was deliberately indifferent to a known risk where that fed-- the federal remedies are available. And so for those reasons, NIRMA would urge the committee not to advance LB341 to General File.

**WAYNE:** Any questions from the-- Senator Holdcroft.

**HOLDCROFT:** Thank you, Chairman Wayne. We just heard a bill about raising the statute of limitations for sexual assault by a third party, third party responsible. So that wouldn't apply, that, that statute of limitations wouldn't apply, in, in this case, if the school was a third party in this--

**BRANDY JOHNSON:** I believe that if I recall correctly, this bill would have a 12 years from the date that--

**HOLDCROFT:** Which is the current statute of limitation, 12 years after age 21, which makes it 33.

**BRANDY JOHNSON:** I guess I should say, without a meaningful statute of limitations, that 12 years is a long time to have-- to be able to deliver evidence.

**HOLDCROFT:** Yeah, yeah. So why wouldn't we want to raise it? That-- the bill we just heard wanted to do away with that statute of limitation.

**BRANDY JOHNSON:** I guess I am not familiar with the other bill and I don't think we'd want to--

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**HOLDCROFT:** OK, thank you very much.

**BRANDY JOHNSON:** --deal with that.

**WAYNE:** Any other questions from the-- Senator DeKay.

**DeKAY:** Real quick, it's-- everybody in the room here wants to eliminate sexual abuse in school regardless if its public, private or whatever it is. How do-- what's the solution? And maybe Senator Halloran can address this with his closing too from his side of the bill. What is the solution going forward that so every, every child is going to be protected going forward?

**BRANDY JOHNSON:** Senator, I wish I knew the answer to that. I, I absolutely wish I did.

**DeKAY:** All right.

**WAYNE:** Any other questions from the committee? Seeing none, thank you for being here. No questions. Next opponent. Next opponent. Welcome.

**BO BOTELHO:** Good afternoon, Chairman Wayne and members of Judiciary Committee. My name is Bo Botelho, B-o B-o-t-e-l-h-o, and I'm general counsel of Department of Health and Human Services. I'm here today on behalf of the department in opposition of LB341. The bill would impose liability on state agencies in the same manner and to the same extent as private individual or entity under like circumstances for all claims arising out of child sexual abuse. This means that a state agency would lose its qualified immunity and could be liable under theories of liability beyond those currently allowed in the State Tort Claims Act. It would expose state agencies to liability for child sex abuse perpetrated by third parties. The bill would not require the victim to have been under the state agency supervision.

**WAYNE:** Can you speak up just a little bit?

**BO BOTELHO:** I'm sorry. Yes. The bill would not require the victim to have been under the state agency supervision or under its care, custody or control when the abuse happens. The taxpayers of Nebraska could be paying for the intentional wrongful act of third parties, even when the state agency acted reasonably with due diligence and was not negligent. The welfare of children of Nebraska is tremendously important to all of us. DHHS takes its obligation to service Nebraska families seriously. However, in the absence of a duty or negligence, in essence, Nebraskans would be indemnifying the perpetrator for a

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wrongful act. The people of Nebraska would pay the price for intentional bad acts of individuals. Thank you for the opportunity to testify today. I'd be happy to answer any questions.

**WAYNE:** Thank you. Any questions from the committee? Seeing none, thank you for being here.

**BO BOTELHO:** Thank you.

**WAYNE:** Next opponent. Next opponent. Welcome.

**ELAINE MENZEL:** Thank you. Good afternoon, Chairman Wayne and members of the Judiciary Committee. For the record, my name is Elaine Menzel. It's E-l-a-i-n-e M-e-n-z-e-l, here today on behalf of the Nebraska Association of County Officials and the Nebraska County Attorneys Association in opposition to LB341. I won't echo-- or I'll echo what the other opponents say with respect to our opposition to the legislation. I'll try not to be repetitive and in fact, I don't intend to be. But I will just acknowledge, certainly, that the Legislature has the prerogative to make modifications in the Tort Claims Act. We would ask that you do not do so and expand that liability for our purposes. But we would also ask you to look at the, the legislative intent in Section 13-902 and essentially, that states that the Tort Claims Act is intended to be the place for the guidelines for purposes of when we are sued. And so with that, we respectfully request you to oppose this legislation because it would be creating an entirely new body of law related to sexual abuse. So with that, I will attempt to answer any questions if you have them.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here.

**ELAINE MENZEL:** Thank you.

**WAYNE:** Next opponent. Welcome.

**JENNIFER HUXOLL:** Thank you. Good afternoon, committee members. I'm Jennifer Huxoll, J-e-n-n-i-f-e-r--

**WAYNE:** Can you speak up just a little bit?

**JENNIFER HUXOLL:** Absolutely, sir. Jennifer Huxoll, J-e-n-n-i-f-e-r, Huxoll, H-u-x-o-l-l, and I am an Assistant Attorney General and the bureau chief of the civil litigation bureau in the Attorney General's Office. I will be honest with you today. We struggled with whether to

testify in opposition or neutral on, on this particular LB. We do see some issues with the bill, but I'm going to focus on today, since I have-- three minutes is not much time. And this is something that we would certainly be willing to talk to Senator Halloran about. At the outset, we want to be clear that we support the ability of child sexual assault victims to be able to hold perpetrators of these crimes to account. And we appreciate Senator Halloran bringing this bill in-- to highlight the importance of the, of the rights of these victims. We do-- I, I, I wish I had time to explain to some of the proponents who have already left who I believe misunderstand that you have no right to bring a lawsuit. That's just not right. You absolutely have a right to bring these lawsuits under different laws, just not under the State Tort Claims Act. And, and so I wish I had the opportunity to explain that to them because I believe that that misunderstanding is causing a lot of harm. The main concern that we have about the way that LB341 is written-- I'm sorry, LB341 is written is that it is, it is going to place these claims, if the Legislature decides that these are claims that the government can be sued for, outside of the State Tort Claims Act. The state-- it's kind of a mysterious activity, the State Claims Board, but it's an, it's an actual entity that hears all the claims against the states and against the governmental entity-- entities. There's a process involved where you notify, notify the state or the political entity of a claim, that the state then gets to investigate the claim, ask questions, go out and look to see, investigate the claim and then make a determination if the claim should be paid. That process is really important and there are a lot of claims that are actually paid when they go through the Claims Board process. This-- the way this is written, it will operate outside of the Claims Board altogether. It makes it more difficult for the state to proactively manage its risk. That Claims Board process allows us time to find witnesses, lock down information, like I said, pay claims, but also just to make sure that any information we have to defend ourselves if the claim is not a legitimate claim is, is, is locked down so that we have that information available, available to us later to defend the claim. So going outside of the claims act is a, is a real concern for us and so we would ask that, that perhaps with some additional visiting with Senator Halloran, there may be some changes that maybe-- may, may be possible.

**WAYNE:** Thank you. Any questions from the committee? Senator Geist.

**GEIST:** I do. I, I was concerned too when-- as the, the people were talking that they didn't understand that there are other ways that they could actually get a solution or a remedy. And I'm interested in

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what your, your pushback and some solutions that you're thinking. So I would like you to go ahead and finish what you have to say.

**JENNIFER HUXOLL:** I do not handle Title IX lawsuits. I won't talk about that, but--

**GEIST:** OK.

**JENNIFER HUXOLL:** --under Section 1983, those are claims where you can-- where-- I've heard several of you refer to ignoring, looking the other way, disregarding an individual public servant who is basically just putting, I think, putting their hands over their eyes. That is, that is not negligence, that's deliberate indifference. And that kind of disregarding, ignoring, looking the other way, saying it's not my problem--

**GEIST:** That's the federal standard, isn't it?

**JENNIFER HUXOLL:** That is the federal standard. That's not negligence. I-- sometimes when I'm trying to explain negligence to laypeople will refer to it as like-- almost like a hindsight is 20/20 standard. I'm looking at what you did and I'm thinking, oh gosh, I might have done it differently and this is what I would have done in that situation. For example, that you have the situation where two kids and a teacher has to step away, an overworked teacher has a lot of kids to manage. She knows these two kids maybe tend to fight, but she's got another issue over here. She steps away to take care of that other issue and there's a major fight and an injury occurs. Anybody can look at that situation and say, well, this is what I would have done differently. That is almost your negligence standard. It's know or should have known that you would have done something-- a reasonable person would have done something differently. The hardest part about this is that it basically sets all of this up for second judging by courts and, and that's when it-- really, it's almost unlimited and it makes it very difficult to manage risk.

**GEIST:** So therefore, the liability of the state can't be calculated.

**JENNIFER HUXOLL:** Correct.

**GEIST:** OK.

**JENNIFER HUXOLL:** And--

**GEIST:** And not-- I'm not saying--

**JENNIFER HUXOLL:** Yeah.

**GEIST:** --one way or the other, I-- this--

**JENNIFER HUXOLL:** It's really tough and I--

**GEIST:** It's, it's an awful situation.

**JENNIFER HUXOLL:** It is. I testified on Senator Halloran's bill last year and this an, this is an issue that's near and dear to my heart. It's really a tough one for me. But I very strongly believe that the, the system that we have works, there are remedies in place and that if people understand what those remedies are, that you can pursue them under both Title IX and under Section 1983. And ultimately, you can pursue the perpetrator, the person who commits these acts. I mean, that's really what this is about, going after the sexual abuser, not this-- the high school or the middle school that maybe could have done-- or possibly could have done things better. But the perpetrator is the person that we really need to be looking at. And should the taxpayers be indemnifying, as Mr. Botelho said, the perpetrator?

**GEIST:** Yeah.

**JENNIFER HUXOLL:** If we're paying on these claims, that means the perpetrator is not paying on these claims--

**GEIST:** Yeah. OK.

**JENNIFER HUXOLL:** --and that's the person who should ultimately be responsible.

**GEIST:** That's helpful. Thank you.

**JENNIFER HUXOLL:** Absolutely.

**WAYNE:** Any other questions from the committee? Senator DeBoer.

**DeBOER:** Thank you so much for talking about the claims process.

**JENNIFER HUXOLL:** Yes.

**DeBOER:** Can you-- so it goes to the Claims Board and they review the information. They have some kind of discovery. They figure out what happened, whatever.

**JENNIFER HUXOLL:** Yeah.



**GEIST:** What happens if they deny a claim? Then what happens?

**JENNIFER HUXOLL:** Then the individual can bring a lawsuit.

**DeBOER:** OK.

**JENNIFER HUXOLL:** Um-hum and so what-- so there's a Claims Board. It-- and they sit-- the main reason that it's really helpful to political subdivisions and state government is it helps us-- it gives us advance notice of claims that are coming. So when we say manage our risk, that's kind of what we're talking about. We know the claim is coming. And so by knowing that this is out there, it allows you to plan ahead as a Legislature for appropriations, us to plan ahead to defend potential lawsuits with staff. And if there is a high-- is-- there's a likelihood that the claim should be paid, it does allow us to pay those claims early on so that individuals can avoid litigation altogether. But that system, it's like-- almost like a mini trial system. I won't call it a trial because witnesses aren't called. But when a claim is brought before the Claims Board, then each of the agencies-- let's say it's an age-- it's-- this-- I'm going to talk about state claims because that's what I'm most familiar with. But let's say this is a claim against the Department of Health and Human Services for something that happened in foster care. They would then be notified of the claim and they would have an opportunity to investigate it, to talk to, to see if there were state actors that needed to be interviewed, information that needed to be retained, perhaps personnel action that needs to be taken. It's really the opportunity to give us the, the early ability to manage and to look at all of the-- to look at this claim in its full-- all the way-- all the edges, look around the edges.

**DeBOER:** How often are claims brought then to court? After they're denied by the Claims Board, how often are they successful after they're denied in the Claims Board?

**JENNIFER HUXOLL:** I don't think I could give you statistics on that.

**DeBOER:** OK.

**JENNIFER HUXOLL:** No, I don't think I could guess--

**DeBOER:** Because they don't have all the discovery that you'd have in a trial so the-- because that sometimes happens that there's more evidence that's uncovered or something so that there might be a case.

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**JENNIFER HUXOLL:** Sure. Absolutely. And sometimes what happens is the Claims board will say, we believe this is an action that is appropriate. It's more appropriate to go through the--

**DeBOER:** Oh, OK.

**JENNIFER HUXOLL:** --through the civil system. And so they'll deny the claim, understanding many times people already have attorneys when they're at the Claims Board level. They have attorneys who are helping them prepare their claims. And so they withdraw the claim and bring it-- bring the action in, in state court where then discovery takes place and you have the full-- all-- the full panoply of rights that are afforded to people when they bring a civil action.

**DeBOER:** And one more question, I'm sorry. So if you're bringing in, like, a 1983 case against thee-- a state subdivision. Does it go-- I mean, because the state would still be potentially liable. So would it go through the state claims?

**JENNIFER HUXOLL:** It does not because that is the-- the Claims Board is established by the State Tort Claims Act.

**DeBOER:** Got it.

**JENNIFER HUXOLL:** And the political subdivisions act has a similar board I believe. County, OK, so-- I'm sorry, that's not my-- I've always been a state lawyer--

**DeBOER:** Yeah.

**JENNIFER HUXOLL:** --so. But for a federal claim--

**DeBOER:** Against the state.

**JENNIFER HUXOLL:** --that would actually-- against the state, that would actually be filed in federal court. It does not go through the Claims Board process. And that's where Senator Geist was asking a question about the difference in the standards. That's one advantage is that you can bring those claims against state and governmental entities without having to go--

**DeBOER:** Through the claims process.

**JENNIFER HUXOLL:** Right.

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**DeBOER:** Got it.

**JENNIFER HUXOLL:** Right. But the-- but then when you're in-- when you're-- if you have a 1983 or a Title IX-- I don't know the standard of proof for Title IX, but because there is no cap on 1983, there is a higher burden of proof, which is that deliberate indifference. And deliberate indifference is just making you prove that somebody was deliberately indifferent to this person's well-being and wasn't just-- it wasn't just a situation where a reasonable person might have made a different decision.

**DeBOER:** Do you have to-- what do you have to show to show deliberate indifference?

**JENNIFER HUXOLL:** I think the examples I've given you, someone who is aware of a harm and looks the other way, somebody who has-- there are policies or procedures in place and you've disregarded them.

**DeBOER:** That meets the standard of deliberate, deliberate indifference?

**JENNIFER HUXOLL:** I'm not sure. I'm not the judge and--

**DeBOER:** Right.

**JENNIFER HUXOLL:** --these cases would be tried to juries and so juries-- judges and juries or judge--

**DeBOER:** Right, I'm just kind of curious what-- like, if you knew what, like, the jury instructions were in terms of what deliberate indifference was, but.

**JENNIFER HUXOLL:** It's certainly something that I think you could run a search and look at cases and what, what deliberate-- that you'll find many fact patterns--

**DeBOER:** Right.

**JENNIFER HUXOLL:** --in case law that-- where there was an ultimate finding of deliberate indifference that will help you to have a better understanding of what that looks like and what it looks like in Nebraska versus what it looks-- in a Nebraska federal, federal or district-- or state court. One other misunderstanding often about 1983, they don't have to be brought in federal court. You can bring them in state court even though it's federal law. So you're not forced

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to go to the federal courthouse to file a 1983. You can file a 1983 action and we see them all the time filed in state court.

**DeBOER:** When the defendant remove them to federal court under a federal question?

**JENNIFER HUXOLL:** They can. They can, but it doesn't always happen.

**DeBOER:** OK.

**WAYNE:** But there is a difference between negligence and deliberate indifference.

**JENNIFER HUXOLL:** Absolutely.

**WAYNE:** And deliberate indifference is a higher burden.

**JENNIFER HUXOLL:** It is. That's correct.

**WAYNE:** So it is part of that claim underneath federal--

**JENNIFER HUXOLL:** That is--

**WAYNE:** --federal law.

**JENNIFER HUXOLL:** --that is correct, but there's no cap. And on the state side, we don't have a cap either so I don't want to create a misunderstanding.

**WAYNE:** No, no. Yeah, that's true. We only cap the political subdivisions.

**JENNIFER HUXOLL:** Yeah.

**WAYNE:** Well, I just want to-- I mean, so they're-- because it's a higher burden, the reality is, is people might not want to go there underneath there because it is-- I mean, a deliberate indifference, isn't that intentional?

**JENNIFER HUXOLL:** No, I don't think it would have to be intentional. There's not an intent component to it. But on the other side of this analysis is an intentional tort, which is sexual-- child sexual, sexual abuse, which meets the definition of the, of the, the statute.

**WAYNE:** Right, but, but deliberate indifference is an intentional disregard standard. It's not--

**JENNIFER HUXOLL:** It's deliberate indifference.

**WAYNE:** --not, not a, not a regular reasonable person negligence standard.

**JENNIFER HUXOLL:** Yes, they're two different standards, they are.

**WAYNE:** OK.

**JENNIFER HUXOLL:** And to some degree, it is a little bit comparing apples to oranges because you have different standards. But I think the key takeaway is that you're not without a remedy. And if you have a situation where there has been-- which is what I'm hearing many, many descriptions of as we've heard testimony today, on just bad act-- very bad actors. I can't say they would meet the standard because a judge or jury is going to make that determination in a 1983 claim. But opening up to just standard negligence, the types-- that's not the stories I'm hearing right now is just negligence. Do you understand what I'm saying?

**WAYNE:** No, I understand.

**JENNIFER HUXOLL:** I'm not saying it very eloquently. But the, the stories that turn our stomachs are oftentimes the stories where there has been-- potentially been deliberate indifference. On the other hand, I think that one other theme that I'm hearing here is that this is, you know, these are public servants who are doing their best to manage big classrooms. And it's very easy to sit in judgment on these folks who are trying to teach a number of students and trying to make good decisions with the, with the information and the budgets and everything that they have. And I don't know that-- the, the nefarious conduct that is so offensive to us in this situation are-- is that from the sexual abuser, the person who is grooming, who is engaging in abuse. And I guess one issue I have is-- and this is maybe more of a personal opinion than that of the Attorney General, but you're shifting that-- the blame and the responsibility for that onto folks who perhaps where it should-- it just doesn't-- it should reside. It should reside with the perpetrator.

**WAYNE:** So-- last question. So underneath the deliberate indifference standard, don't-- doesn't the--wouldn't, wouldn't a school district have to have actual knowledge?

**JENNIFER HUXOLL:** I don't know the answer to that.

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**WAYNE:** OK.

**JENNIFER HUXOLL:** I don't-- the other thing is if you're talking schools, you've also got Title IX.

**WAYNE:** Title IX doesn't really apply in these cases, though. It's--

**JENNIFER HUXOLL:** I, I can't speak to that.

**WAYNE:** OK.

**JENNIFER HUXOLL:** And I can-- also, I have a difficult time talking about schools in general because--

**WAYNE:** Right, I understand.

**JENNIFER HUXOLL:** --I don't-- they're not under my-- they're not who I'm typically defending. I'm typically defending the Department of Health and Human Services or Department of Corrections. And I think Department of Health and Human Services is probably the agency that I represent that will see the most potential effect from this if LB341 is to go forward.

**WAYNE:** OK. Thank you. Any other questions? Seeing none, thank you for being here.

**JENNIFER HUXOLL:** Thank you.

**WAYNE:** Next opponent. Opponent. Seeing none, turning to neutral testimony. Next neutral testifier. Seeing none, as Senator Halloran comes up to close, we received 86 letters. Support of 80, opposition of five and one in the neutral. I think the neutral person just didn't realize that they were doing, so.

**HALLORAN:** Probably.

**WAYNE:** Welcome back.

**HALLORAN:** Thank you, Mr. Chairman. Welcome back to you. We-- so we had a-- an enlightening conversation here just over the last 15, 20 minutes. Deliberate, deliberate indifference, as you pointed out, several pointed out, that is a very high hurdle to prove, right? It's very subjective in some respects. Negligence is a little more easily proven. And I guess I'm a little bit amused that some of the testimony, those opposed to this. A little amused with the interest on

the part of some government agencies for this, this is impacting them on their efficiency. I, I think they have bigger problems than this with efficiency. And there's a new interest-- a new elevated interest in, in the taxpayers and how much this will cost taxpayers. I thought that was rather refreshing on the part of some of the agencies to be concerned about that. But let's, let's, let's stick to the question about deliberate indifference. If we just stick to deliberate indifference, if we just try these cases on 1983, there's going to be a lot of cases, a lot of cases where these children are going to be guilty of negligence, not deliberate indifference, all right? And so what do we do for all those kids? Oh, well, they just didn't reach the bar, right? They didn't reach the federal bar or the federal level of, of qualifying to have a suit. So I would open this up to question. I neglected to thank all the testifiers, pro and con. It was hard for any of them to come up here and talk to you if they had been abused. That was hard. If they had family members that had been abused, that was hard. And frankly, if they were government agencies, that was an awkward position that we-- that I put them in, in respect to having to come up to testify. Because I know in their heart they have a deep concern as well as I do for these kids that might have been at the hands of people that others, others in the school or the agency witnessed them, possibly, you know, doing something they shouldn't have done, didn't turn them in, whatever the case may be, groomed them. We hear the term "groom" a lot. That happens. But whatever the case is, I know it's hard for these agencies to come up here and testify against this. I know in their heart they're not against doing something for these kids that have been sexually wronged and sexually abused. So with that, I'll close for questions.

**WAYNE:** Any questions from the committee? Seeing none, thank you for being here. And that closes the hearing on LB341 and we'll open the joint hearing on LB521, Senator Walz, and LB795, Senator Wayne. Ms. Callaway, you may. Oh, wait a second. Let them clear out.

**AMANDA CALLAWAY:** Sounds good.

**WAYNE:** Go ahead and go.

**AMANDA CALLAWAY:** Good afternoon, Chairman Wayne and members of the Judiciary Committee. My name is Amanda Callaway, A-m-a-n-d-a C-a-l-l-a-w-a-y, and I'm the legislative aide for Senator Walz, who represents Legislative District 15, which is made up of Dodge County and Valley. Unfortunately, she could not be here today to open on this bill. She is introducing LB521, which extends the immunity already

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provided in statute for naloxone distribution to school personnel. As we all know, the opioid epidemic continues to worsen and unfortunately our schools are not exempt from that. According to the CDC, in 2021, 12 percent of high school students had misused prescription pain medicine and 6 percent had misused in the past 30 days. Senator Walz had spoken with Superintendent Mark Shepherd at Fremont Public Schools. He indicated that the current interpretation of Nebraska statute regarding immunity of naloxone distribution excludes schools. So right now, schools across the state are not even taking in naloxone because they're worried about being held liable. LB521 simply adds the words "school personnel" with the current list of family member, friend or other person who is in a position to assist a person who is apparently experiencing or is likely to, likely to experience an opioid-related overdose other than emergency responder or peace officer. This is a small change to ensure that school personnel are prepared for a potential overdose in their schools. And with that, if you have any further questions regarding this bill, please feel free to contact Senator Walz or our office. Thank you.

**WAYNE:** Thank you for being here.

**DeBOER:** Senator Wayne, are you going to open on--

**WAYNE:** Yeah, I'm just going to--

**DeBOER:** --LB795?

**WAYNE:** I'm going to be lazy right now and open from here and be really short. LB795 will allow the state standing order of Good Samaritan laws to ensure professionals are able to distribute the best and most appropriate opioid antagonists.

**DeBOER:** Thank you, Senator Wayne. First proponent for the joint hearing of LB521/LB795. Welcome.

**MATTHEW WELSH:** Thanks for having me. Mr. Chairman. And members of the committee, my name is Matthew Welsh. It's M-a-t-t-h-e-w W-e-l-s-h and I am director of government affairs at Opiate Pharmaceuticals, an organization focused on developing best-in-class medicines for the treatment of addiction and drug overdose. I am testifying today in support of LB795, which would, which would remove specific references to the, to the naloxone hydrochloride molecule in Nebraska's definition of opiate antagonist. The purpose of this is to ensure Nebraska is able to access new formulations of FDA-approved opioid



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antagonists. According to data released by the CDC's National Center for Health Statistics, there were an estimated 107,477 drug overdose deaths in the U.S. over a 12-month period ending April 2022. We know the opioid epidemic has shifted primarily from a prescription opioid to a fentanyl-based opioid crisis. This is concerning due in part to the increased strength and length of effects of fentanyl versus a natural opioid like prescription pills or heroin. As the opioid crisis continues to evolve, innovative reversal agents are being developed which may be better suited to reverse an overdose caused by synthetic opioids. As these agents become available, they will offer states, providers and patients more choices to combat deadly overdoses. As currently written, however, Nebraska's code would preclude formulations that don't use naloxone to be dispensed. We ask that the language be expanded to include all FDA-approved opioid overdose reversal agents instead of being limited to naloxone. This simple language change will ensure that Nebraska can access all available opioid antagonists and have every tool available to them in a time of crisis. I appreciate your consideration and hope you will vote to report this call favorably and I'm happy to answer any questions.

**DeBOER:** Thank you for your testimony. Senator Holdcroft has a question.

**HOLDCROFT:** Thank you, Vice Chair DeBoer. Not being familiar with this naloxone, is there a downside? I mean, if you inject someone who's not having an overdose, is there any--

**MATTHEW WELSH:** So no, naloxone does not have any side effects. If you were to right now inject yourself with naloxone and you are not on any sort of opioid, nothing would happen to you.

**HOLDCROFT:** OK. Thank you.

**DeBOER:** Thank you, Senator Holdcroft. Other questions? I do not see any. Thank you.

**MATTHEW WELSH:** Thank you.

**DeBOER:** Next proponent. Welcome.

**AMY HOLMAN:** Thank you. I actually have testimony for both so I'll just try to do a little bit of each one.

**DeBOER:** OK.

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**AMY HOLMAN:** So Chairman Wayne, members of the Judiciary Committee, my name is Amy Holman, A-m-y H-o-l-m-a-n, and I submit this testimony as the project manager for the Nebraska Pharmacists Association. The NPA manages a grant for the statewide Narcan program. This program supplies naloxone nasal spray to any resident of Nebraska at no cost. Currently, 100 pharmacies across Nebraska participate in this grant program and dispense naloxone to consumers in Nebraska, including school personnel. This bill protects school personnel so they are not hesitant to administer naloxone in the event of an emergency and this is why we are in support of LB521. The NPA would respectfully request that the committee advance LB521 for further consideration for the full Legislature. And LB795, again, we run the statewide Narcan program and Stop Overdose Nebraska so that we want to get Narcan or naloxone to people that need it. But we want to thank Senator Wayne for recognizing that naloxone will not be the only opioid antagonist going forward. We are aware that there are medications in the pipeline that will be available in the future to reverse an opioid overdose. This bill will expand the protections for individuals administering any opioid reversal medications. The NPA would respectfully request that the committee advance LB795 for further consideration by the full Legislature.

**DeBOER:** Thank you very much for your testimony. Are there questions for this testifier? I do not see any.

**AMY HOLMAN:** OK.

**DeBOER:** Thank you so much.

**AMY HOLMAN:** Thank you.

**DeBOER:** Next proponent. Is there anyone else who would like to testify in favor of the bill? Is there anyone who would like to testify in opposition to LB521 or LB795? Anyone in neutral capacity for either bills? Senator Wayne waives clothing-- closing. For the record, there are five letters of support for LB521 and four letters of support for LB795. That will end our hearing on LB521 and LB795 and bring this to LB351. Senator Wayne, you are welcome to open.

**WAYNE:** Thank you. That last-- those last two bills are consent calendars. I like it. Good afternoon, Vice Chair DeBoer and fellow members of the Judiciary Committee. My name is Justin Wayne, J-u-s-t-i-n W-a-y-n-e, and I represent Legislative District 13, which is north Omaha and northeast Douglas County. LB351 will do several

things that I think will benefit Nebraskans. Firstly, removing the cap of any occurrences resulting in catastrophic loss or death. Whatever your feelings are about caps on just malpractice is one thing, but if a person dies from medical malpractice occurrence, there should be no cap and any business that is responsible for that death of an innocent person should be held responsible. On the floor. The other day, I talked about this scenario and it's the easiest way to describe the medical malpractice cap and what I think is wrong with it. If a surgeon gets up that morning and starts drinking and goes to work and continues to drink and performs a procedure wrong and that person dies, it is capped. Once they leave their car-- or once they leave their work and hop in the car and start driving and they hit somebody in their car, it's not capped. I think we should have a higher burden for those who are using their license and it shouldn't be something that's capped. I know for years I've been talking about this in this committee. I've been trying to work with the Department of Insurance and other agencies. At one point, they were supposed to work with Senator Lathrop two years ago. And from my conversations with Senator Lathrop, that did not go anywhere. I think it's interesting when you look at the fiscal note, when you start going through here and it basically says that premiums will increase at 200 percent at a minimum. Well, then maybe we should put a cap on the premiums. Maybe that's the answer because I think it's inappropriate to, to, to threaten that caps or because of this, it will go up. But the reality is what I'm asking this committee to do is even if they, if they want to have a cap, if they want to keep a cap, that's fine, but at least pay for their medical. Otherwise, it goes on the state. Most of these individuals who have catastrophic losses, particularly around kids, they end up on DD waivers or they end up on Medicaid and we're paying for it anyway. I just think at some point, we have to hold people accountable to make sure that they're doing that. But what's interesting about this fiscal note about a 200 increase, it should be noted that over the-- I think it was the last several years, insurance companies have been having record profits and the industry as a whole netted last year \$31 billion, netted \$31 billion. I just have a hard time understanding if you're netting \$31 billion and we're just saying pay for medical or if it's catastrophic, let's make sure we can pay for it, that somehow we're going to increase premiums by 200 percent. It's just mind boggling that that was in the fiscal note and that we're going to hear a lot-- and that people are going to come up and testify against it. But there's just no justification, in my opinion, that because you're using your license in a medical facility, somehow you're capped. But when you walk out, you're not capped, just is mind

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blowing to me. It's really that simple. I don't have a lot of argument. It's that simple to me. I'll answer any questions.

**DeBOER:** Are there any questions for Senator Wayne? I don't see any, Senator Wayne.

**WAYNE:** Thank you.

**DeBOER:** First proponent. Are there any people here who would like to testify in favor of this bill? I'll take our first opponent.

**DANIEL ROSENQUIST:** Thank you. Good afternoon, Vice Chair DeBoer and members of the Judiciary Committee. My name is Daniel Rosenquist, D-a-n-i-e-l R-o-s-e-n-q-u-i-s-t. I'm a family medicine physician in Columbus and the current president of the Nebraska Medical Association, which represents nearly 3,000 physician residents and medical students across the state. Nebraska Medical Association is opposed to LB351 because of the significant detrimental effect it would have on healthcare in Nebraska. If enacted, LB351 would require providers to carry liability coverage of \$10 million per occurrence in order to participate in the Excess Liability fund. As an independent family physician, I can tell you that would be incredibly difficult, particularly for, for physicians in independent practice. We've already heard from members that they would choose to buy policies with lower limits that do not qualify under the Excess Liability Fund. That means when a patient sustains an injury that is greater than the provider's policy limits can compensate, that patient may find themselves without a remedy. Additionally, because many providers will not be able to take advantage of the fund's coverage, some would likely choose not to provide care that has a high risk of liability, such as obstetrical care. In small communities, family physicians such as myself are the ones who provide this OB care and we are able to do that because the premium for a family physician doing obstetrics is much more affordable on a \$500,000 underlying limit policy, as required by the-- under the current law than it would be for a \$10 million policy under LB351. This bill would further limit access to such care in rural areas. By significantly increasing professional liability cost to practice in Nebraska, recruitment of healthcare providers into the state will be negatively hindered and Nebraska will have a difficult time competing for these providers with other states who have a more favorable environment. This will in turn have a harmful impact on access to healthcare in rural and underserved areas. The NMA is committed to being a good steward of the Excess Liability Fund. Historically, the NMA has been the organization to bring forth--

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forward increases to the liability cap, as well as increases to the underlying liability policy limits. Notably, LB68, which was advanced on General File last week, would increase the underlying policy limits for \$500,000 to \$800,000, which will increase revenue and reduce risk through the fund. We understand that in the near future, it will be time to raise the cap, as we have done four times since the act was passed, most recently in 2015. LB68 will in-- will help ensure that the fund is healthy so that the cap can ultimately be increased appropriately and responsibly, ensuring that the fund is around for providers and patients for years to come. LB351 would have the opposite effect and undermine Nebraska's ability to maintain this important fund. For these reasons, the Nebraska Medical Association respectfully requests the committee not to advance LB351 Thank you.

**DeBOER:** Thank you very much for your testimony. Are there questions? Senator Blood.

**BLOOD:** Thank you, Vice Chair DeBoer. Just a quick question. And you, you talked a little bit about it, but I'm kind of looking for a number. Don't OB-GYNs pay, like, a substantial amount of more insurance than, like, a general practitioner? And I mean, like, ten times more or some bizarre number like that.

**DANIEL ROSENQUIST:** I can't quote you numbers, but it-- I would-- some-- as a rural family physician who does not do OB, I have a policy limit at a certain level. If I do OB, it's a, it's a higher level. If I do OB with surgical procedures and doing C-section, it's higher. An OB-GYN doing the same things will pay even more than that, so.

**BLOOD:** Didn't, didn't at one time, like, in the last decade, we lose quite a few OB-GYNs because of the rate? I had an OB-GYN tell me this, so I don't know--

**DANIEL ROSENQUIST:** I--

**BLOOD:** They felt like they had had several people that had stepped down as to the magnitude of services they were able to provide because the insurance was just so ridiculous.

**DANIEL ROSENQUIST:** I think you've seen a lot of OB-GYNs become gynecologists--

**BLOOD:** Yeah.

**DANIEL ROSENQUIST:** --rather than OB and gynecology.

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**BLOOD:** That's exactly what they said, so thank you.

**DeBOER:** Thank you, Senator Blood. Other questions for this testifier? I don't see any. Thank you for being here.

**DANIEL ROSENQUIST:** Thank you.

**DeBOER:** Next opponent.

**ANDY HALE:** First time doing this. Vice Chair DeBoer, members of the Judiciary Committee, my name is Andy Hale, A-n-d-y H-a-l-e, and I am vice president of advocacy for the Nebraska Hospital Association and I'm here testifying in opposition to LB351. Raising medical malpractice caps will translate into increased insurance premiums for physicians, hospitals and healthcare professionals. It will result in significantly higher insurance premiums and legal costs, which will lead to increased healthcare costs for patients. Many doctors are cutting back on high-risk life-saving services, relocating to states with more patient-friendly liability laws, retiring early or leaving the practice of medicine altogether. Nebraska is facing a physician shortage, particularly in our rural areas. Fourteen of Nebraska's 93 counties have no primary care physician and nearly one-fifth of physicians in Nebraska are more than 60 years old. Doctors are harder, harder-- are harder and harder to find, especially in specialties such as OB-GYN. A 2022 study found that total number of physicians practicing in Nebraska decreased last year with 15 fewer obstetricians. The study also found that nearly 50 percent of OB-GYNs have altered their practices due to the fear of lawsuits, with many saying they are accepting fewer and fewer high-risk patients. Over 70 percent of counties in Nebraska are maternity care deserts. Maternity care desert is a term used to describe an area where there's limited access to maternity care, including prenatal, labor, delivery and postpartum care. Nebraska has, has such a high percentage of maternity deserts because of the current shortage of healthcare providers and the difficulty in attracting and retaining healthcare professionals in rural areas. Eighty-three percent of counties in Nebraska do not have an obstetrician. That is nearly 75,000 women who do not have access to that kind of specialty care. This bill will only add to healthcare workforce shortage. The shortage impacts both Nebraska's physical health and economic health. Lack of care impedes the ability of communities throughout the state to draw and hold residents and the businesses that employ it. I urge this committee to oppose LB351 and I'll answer any questions.

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**DeBOER:** Thank you for your testimony. Senator DeKay has a question.

**DeKAY:** Just a quick one. From rural perspective, if there is a practice-- practicing OB-GYN doctors out there, what happens in the case of an emergency birth or something takes place in a rural area before they can get transported? Is-- what's the insurance risk or if something goes wrong in that procedure?

**ANDY HALE:** Well, our hospitals will continue to treat and stabilize. But, you know, if it's a serious complication, you know, sometimes we're not always probably the most appropriate place to handle them. We will make sure that those births occur. But if they're a high-risk pregnancy, they should-- probably are going to have to travel a pretty far distance in our state beforehand-- hopefully beforehand, before that medical emergency occurs.

**DeKAY:** Well, I'm just thinking, say, in case of a car accident or something like that where emergency measures have to be taken at that appropriate-- at that time right, right there on the spot, so--rather than being able to stabilize them and transfer them.

**ANDY HALE:** Yeah. We'll do our best that we can, but it's a serious concern. The more of those physicians, nurses, those in that specialty in those areas that we can have, the better chance of getting them to the nearest facility hopefully in a sooner time.

**DeKAY:** Thank you.

**ANDY HALE:** Thank you, Senator.

**DeBOER:** Thank you, Senator DeKay. Other questions for this testifier? I do not see any.

**ANDY HALE:** Thank you, Senator. Thank you, committee.

**DeBOER:** Next opponent. Welcome.

**DAVID ERNST:** Thank you. Good afternoon, Vice Chair DeBoer, members of the committee. My name is David Ernst, D-a-v-i-d, last name, E-r-n-s-t, and I'm an attorney in private practice in Omaha with the law firm of Pansing, Hogan, Ernst and Bachman. I'm here to testify on behalf of the Nebraska Medical Association and the Nebraska Defense Counsel Association in opposition to LB351, which we believe is a remedy in search of a problem. By way of background, I'm a 1983 graduate of the University of Nebraska School of Law and I've been

practicing law in Omaha continuously since that time with the same law firm that I joined upon graduating from Lincoln. I'm a trial attorney. I practice predominantly in civil litigation, mostly representing defendants, but not exclusively. And my specialty area is medical malpractice litigation. I've been the first chair attorney in more than 100 civil jury trials that have gone from jury selection to jury verdict and the majority of those have been medical malpractice cases. I've had the privilege of representing physicians and PAs, APRNs and nurses in many different specialty areas, including plastic surgeons, family practice doctors, emergency medicine, gastroenterologist, obstetricians, gynecologists and, and many other areas of specialty. I tried my first medical malpractice case in Douglas County District Court in 1992 and more recently, the last one I tried was also in Douglas County District Court in August of last year. I've tried medical malpractice cases in both federal court and state court in Nebraska, in Omaha, Lincoln and many other communities. I'm also licensed in Iowa and have tried medical malpractice cases there in Council Bluffs and other jurisdictions. The reason for my testimony here today is because I believe that LB351 is not only unnecessary for the fair and appropriate adjudication of justice in medical malpractice cases at the current time, but also because I believe that this bill, if passed, would likely jeopardize the current system of adjudication under the Nebraska Hospital Medical Liability Act, which has worked remarkably well since it was first enacted. Submitted with the written materials that I provided you were by my own comments, but also the comments of a colleague of mine, Bill Settles, who's also an experienced malpractice defense lawyer, and it lays out the background of the act, including the various times when the cap has been raised over the years. From my standpoint as an active participant in the litigation of medical professional negligence cases for more than 35 years, the Nebraska Hospital Medical Liability Act, with the cap that's currently in place, has worked remarkably well, both for patients and for their healthcare providers. A significant number of medical malpractice cases are settled every year within the limits of coverage and of the cases that have gone to trial over the years, only a very small number, a handful, have resulted in jury verdicts that were in excess.

**DeBOER:** Sir, sorry, you've got the red light.

**DAVID ERNST:** Thank you. In summary, I believe that LB351 is not necessary in the current environment and we oppose it and ask the committee to oppose it. Thank you.



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**DeBOER:** Thank you. Let's see--

**DAVID ERNST:** Any questions?

**DeBOER:** --let's see if there are any questions for you, sir. Anybody have any questions? I was going to ask you, you've been involved with this-- with medical malpractice cases for a long time. The cap, it seems-- I'm looking at a-- the NMA provided us with a-- sort of a history of the cap and it went up in '92-- or '85, '93, 2004, 2015. Is it getting to be time again that we raise the cap? I mean, it seems to go up about every ten years. Would you say we're getting-- maybe not to what Senator Wayne has here or something like that, but is there, is there-- are we getting there?

**DAVID ERNST:** I think it makes sense to review that every few years and perhaps it's getting close to that point. I would argue it's not there now, but within the next few years, it would be appropriate to, to consider a modest increase or a reasonable increase.

**DeBOER:** It looks like there-- it's increasing about \$500,000 every time they do increase it. One time it was \$250,000, but the rest of the times, it's been \$500,000. So would there be, you think, an opportunity to look at that in the future-- in the near future?

**DAVID ERNST:** I-- you know, I assume that's something that should be looked at every, every few years. And so, yes, I think it makes sense to review that and say, is it now time to, to increase it?

**DeBOER:** OK. Thank you.

**DAVID ERNST:** Thank you.

**DeBOER:** Any other questions? I don't see any. Thank you for being here.

**DAVID ERNST:** All right, thank you.

**DeBOER:** Next opponent,

**MATT SCHAEFER:** Vice Chair DeBoer and members of the committee, my name is Matt Schaefer, M-a-t-t S-c-h-a-e-f-e-r, appearing today on behalf of COPIC. COPIC is a medical professional liability insurance carrier in Nebraska, providing coverage to physicians and healthcare facilities since 2002 in Nebraska. COPIC is the endorsed carrier of the Nebraska Medical Association, a partnership that shares a strong

commitment to ensuring that Nebraska remains an attractive place to practice medicine and access high-quality care. COPIC currently provides coverage to physician facilities that participate in Nebraska's patient compensation fund. Its ability to carry out that mission depends in part on the continued viability of the damage limitation contained within the Hospital Medical Liability Act. The act was designed to improve the availability and affordability of liability insurance to encourage physicians to practice in Nebraska to improve the availability and affordability of medical services in Nebraska. The tort environment and cost of professional liability insurance is one of many factors physicians consider when starting a practice or accepting a job. COPIC estimates that this bill would lead to an increase in excess of 200 percent in professional liability premiums and that's a conservative estimate. Currently, there is no state with policy limits at this time. The absence of large claims in Nebraska historically has been due to the fund's ability to step in. This bill eliminates the fund's ability to limit large claims and for this reason, it's impossible to forecast what severity of claims would look like if this bill passes. The bill's proposed limits are set so high that one would actually anticipate an increase in claims as well. And that is the reason the estimate of a 200 percent increase is likely to be low, which would frustrate the point of the act to begin with. Additionally, if limits were increased to \$10 million per occurrence, you would inevitably see a reduction of insurance carriers willing to insure positions in hospitals in Nebraska. And also you would see a lack of support from reinsurers for such high limits and potential exposures. It is COPIC's desire to provide insurance coverage to healthcare providers in Nebraska. Ensuring the effectiveness of the fund and the intent of the act is important not only to COPIC, but to ensure that patients and families have access to caregivers in Nebraska. We would ask you to oppose LB351. Thank you

**DeBOER:** Thank you for your testimony. Are there questions? I don't see any. Thank you for being here.

**MATT SCHAEFER:** Thank you.

**DeBOER:** Next opponent.

**KENT ROGERT:** Good afternoon, Chairman DeBoer-- Senator DeBoer and the members of the committee. My name is Kent Rogert, K-e-n-t R-o-g-e-r-t, and I'm here today representing the Nebraska Association of Nurse Anesthetists in opposition of LB351. Usually I'm representing these guys in the HHS Committee. This is a little different for us, but we

are titled CRNAs, certified registered nurse anesthetists, and we are advanced practice registered nurses that do about 80 percent of the anesthesia care in the state of Nebraska. We are the other professionals licensed separately enrolled in this act. Most of what I've had down here has been said before me, but I want to talk to you a little bit about the differences-- we have a couple of different categories of our CRNAs. We have a large amount of them that are employed by the hospital systems in Omaha and Lincoln and the big cities, in the middle-sized cities. But we have the ability to practice independently in Nebraska and so our critical access hospitals are mostly covered by independently incorporated anesthesia provider groups CRNAs. So I'd use this example: we've got a group of eight, sometimes ten CRNAs out in Hastings and they cover all the hospitals in the south-central Nebraska area in terms of surgeries and on-call ERs at-- during the evenings and during the day and then they deliver-- they help deliver babies for those doctors that are down there. If, if we make cost to be a CRNA super expensive out in some of those areas, they will simply stop their, their practice out there, either earlier or altogether and probably go work for hospitals where they can have that stuff kind of covered in the-- in part of their employment. And Mr. Hale mentioned there are what we call OB deserts across the state. There will be more of those because if there are no CRNAs out in those critical access areas, there will be no procedures and there will be no baby deliveries. So we ask for you to hold this bill and I'd answer any of your questions that I can.

**DeBOER:** Are there any questions? Thank you for your testimony. Next opponents. Anyone else here who would like to testify in opposition to this bill? Is there anyone who would like to testify in neutral? While Senator Wayne is coming up to close, I'll tell you for the record that LB351 has one letter, letter in opposition. Senator Wayne, you're welcome to close.

**WAYNE:** Thank you and I'll keep this short because I know it's Friday and people want to get out of here. I'm willing to work with anybody to figure out. I think we have to, as a, as a Legislature, figure out what to do with these catastrophic events. But to come up here and say this is a solution in search of a problem is, is kind of disingenuous in the sense that I just passed out two awards where the jury, one of them found \$26 million. That means a jury of their peers who looked at experts, looked at all the medical costs it's going to take, take to-- in the future to take care of this individual and the jury came back and said \$26 million. The family hopes to get 4.5 and how the 4.5 happened is because they're going to and then the families too. So the

parents get something in and the kid gets something. The other one is from a while ago where there was a jury award for \$11 million and they had to reduce it down to, I think, 1.5 at the time was that cap. So it's, it's not a, a problem in-- or a solution in search of a problem. The problem is there. It's what are we going to do to wrestle with it? Again, we got a little bit of time and a long session to figure it out. I'm willing to sit down with-- work with anybody to increase the caps, figure out what we could do and go from there.

**DeBOER:** Questions for Senator Wayne? I don't see any, Senator Wayne. That will end our hearing on LB351 and we'll end our hearings for today.